DOCKET

No. 09-5270

Title:	Eric Presley, Petitioner
	v.
	Georgia
Docketed:	July 14, 2009
Lower Ct:	Supreme Court of Georgia
Case Nos.:	(S08G1152)
Decision Date:	March 23, 2009
Rehearing Denied:	April 10, 2009

Date	Proceedings and Orders
Jul 9 2009	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due August 13, 2009)
Aug 13 2009	Brief amicus curiae of Georgia Association of Criminal Defense Lawyers filed.
Aug 13 2009	Brief amicus curiae of Reporters Committee for Freedom the Press filed.
Aug 17 2009	Waiver of right of respondent Georgia to respond filed.
Aug 20 2009	DISTRIBUTED for Conference of September 29, 2009.
Sep 1 2009	Response Requested. (Due October 1, 2009)
Sep 30 2009	Order extending time to file response to petition to and including November 2, 2009.
Nov 2 2009	Brief of respondent Georgia in opposition filed.
Nov 12 2009	Reply of petitioner Eric Presley filed.
Nov 18 2009	DISTRIBUTED for Conference of December 4, 2009.
Dec 7 2009	DISTRIBUTED for Conference of December 11, 2009.
Jan 4 2010	DISTRIBUTED for Conference of January 8, 2010.
Jan 11 2010	DISTRIBUTED for Conference of January 15, 2010.
Jan 19 2010	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. Judgment REVERSED and case REMANDED. Justice Thomas filed a dissenting opinion. Opinion per curiam. (Detached Opinion)

PETITION FOR WRIT OF CERTIORARI

UNITED STATES SUPREME COURT

ERIC PRESLEY,
Petitioner

v.

STATE OF GEORGIA,
Respondent

On Petition for Writ of Certiorari
to the Georgia Supreme Court

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. This Court has established that the public cannot be expelled from a courtroom unless the presence of the public creates a "substantial probability" of prejudice to an "overriding interest." But is some case-specific evidence required to meet this "substantial probability" test, or can generalized fears that would apply equally to nearly every trial suffice?

II. This Court has repeatedly held that a trial court must consider reasonable alternatives to closing a proceeding before it can exclude the public. But who bears the burden of suggesting such alternatives? Must the proponent of closure establish that closure is necessary, in that there are no reasonable alternatives available? Or to overcome a closure motion must an opponent of closure establish that reasonable alternatives do exist?

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Most courts have required case-specific evidence that there is an actual, substantial probability of harm to the interest sought to be protected by a courtroom closure. But the Georgia Supreme Court approves closures based on nothing but amorphous possibilities. This Court should grant the writ of certiorari to clarify whether case-specific evidence is required, and to protect the critical right to a public trial. 10

The Georgia Supreme Court noted that this Court has not yet provided "clear guidance" regarding the proper assignment of the burden to keep our courtrooms open. Many courts hold that the opponent of closure must suggest alternatives to closure. But numerous other courts have held that those seeking to exclude the public must show that there is no available less-intrusive alternative. This Court should grant the writ of certiorari to resolve this split of authority, and to provide the guidance sought by the lower courts. 18

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* The motion for new trial hearing addressed five issues, only one of which is implicated by this petition. To limit the appendix to relevant materials, Mr. Presley has omitted those portions of the transcript that do not involve the courtroom closure issue. He has likewise omitted those portions of the trial transcript which are not relevant here.

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OPINIONS BELOW

The decision of the Georgia Supreme Court is found at Presley v. State, 285 Ga. 270, 674 S.E.2d 909 (2009), and in the appendix, at page 1 (hereinafter cited as App.). The decision of the Georgia Court of Appeals is found at Presley v. State, 290 Ga. App. 99, 658 S.E.2d 773 (2008), and at App. 8. The opinion of the trial court is unreported, but can be found at App. 12.

JURISDICTION

The judgment of the Georgia Supreme Court was issued on March 23, 2009. Mr. Presley's timely motion for reconsideration was denied on April 10, 2009. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Section one of the Fourteenth Amendment to the United States Constitution provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

Petitioner Eric Presley was tried for a state law offense of trafficking in cocaine.[1] At the outset of Mr. Presley's trial, immediately after he was seated at counsel table, the trial court excluded unidentified observers from the courtroom and from the entire floor of the courthouse. It excluded the spectators both before and after identifying one of these observers as Mr. Presley's uncle. The Georgia Supreme Court recounted the relevant facts:[2]

> At Presley's trial, before the prospective jurors were brought into the courtroom for jury voir dire, the trial court inquired of a courtroom observer: "Now, the gentleman in the black shirt, sir, do you have a case or ...," which elicited the response: "No, I'm just here." The trial court replied: "The reason I say that is for all the other observers in the courtroom, when I -- when the jurors come up, they will be sitting on those rows, and you can't sit on the same rows with the jurors."

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[1] The underlying facts of the crime are not relevant to the questions presented by this petition. They were efficiently summarized, however, by the Georgia Court of Appeals. Presley v. State, 290 Ga. App. 99, 99-100, 658 S.E.2d 773, 775 (App. 8-9) (2008).

[2] This Court, of course, largely defers to a state court's findings of fact. Culombe v. Connecticut, 367 U.S. 568, 603, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961) ("Where [a state court has] made explicit findings of fact, those findings conclude us and form the basis of our review -- with the one caveat, necessarily, that we are not to be bound by findings wholly lacking support in evidence"). In any event, the Georgia Supreme Court's recitation of the facts is amply supported by the trial transcript. See App. 61-63.

After an unrecorded colloquy,[3] the court said: "And, and the gentleman in the black shirt, you should not hang around on the sixth floor. He can go down to the, maybe the snackbar? ... Is he a witness? Are you a witness?" The observer replied: "No, I'm Mr. Presley's uncle." The court said:

> Okay. Well, you still can't sit out in the audience with the jurors. You know, most of the afternoon actually we're going to be picking a jury. And we may have a couple of pre-trial matters, so you're welcome to come in after we plete [sic] -- complete selecting the jury this afternoon. But, otherwise, you would have to leave the sixth floor, because jurors will be all out in the hallway in a few moments. That applies to everybody who's got a case.

Presley's counsel objected to "the exclusion of the public from the courtroom." The court responded:

> I'm not excusing the public from the courtroom. There just isn't space for them to sit in the audience. We have very small courtrooms, and the witnesses and relatives cannot sit in the audience beside the potential jurors. That will be grounds for a mistrial, and because of a tainted jury panel.

Presley's counsel then said: "Well, I'm wondering, Your Honor, whether ... some accommodation could not be made for both, some of those members of the family and the jurors?" The court answered:

> Well, the uncle can certainly come back in once the trial starts. There's no, really no need for the uncle to be present during jury selection. When the trial starts, he can certainly come back into the courtroom. But he -- we have 42 jurors coming up. Each of those rows will be occupied by jurors. And his uncle cannot sit and intermingle with

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[3] The transcript reveals that this unrecorded colloquy was irrelevant: it "was held between the court and counsel in other unrelated cases." App. 61.

> members of the jury panel. But, when the trial starts, the opening statements and other matters, he can certainly come back into the courtroom.
>
> Presley took exception to the court's ruling.

Presley v. State, 285 Ga. 270, 270-71, 674 S.E.2d 909, 910 (App. 1-2) (2009) (all ellipses in original).

Mr. Presley was convicted at trial. At the hearing on his motion for new trial, Mr. Presley presented uncontradicted evidence regarding the size and seating capacity of the courtroom: the courtroom contained eight benches for spectator seating; four on each side of the courtroom, separated by a twelve foot wide corridor. App. 23-24. The trial transcript reveals that forty-two jurors were present for voir dire: fourteen in the jury box, and six per bench. App. 65, 68. This meant that jurors occupied just twenty-eight of the forty-eight available spectator seats.[4] These twenty-eight jurors therefore occupied just five benches in the courtroom, leaving

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[4] This is using the trial court's chosen method of seating six jurors per bench. More people could have been seated using alternative seating arrangements. For example, Mr. Presley presented uncontradicted evidence that the two rear benches are significantly longer, easily holding an extra person each. App. 29. And during court proceedings incarcerated defendants are typically seated at seven defendants per shorter bench. App. 24. Finally, in some identical courtrooms, additional chairs are placed at the ends of the six shorter benches to increase seating capacity. App. 25-28.

Either method -- using extra chairs or seating seven to a bench -- would have placed all twenty-eight jurors on one side, freeing half of the courtroom for spectators.

three benches entirely empty.

The trial court nevertheless ruled that it had

> reasonably instructed Defendant's uncle that he could not sit out in the courtroom next to the prospective jurors during voir dire due to the limited space in the courtroom. The Court was also concerned about the possibility of misconduct should there be any interaction between the Defendant's uncle and potential jurors in this case.

App. 12 (citation omitted).

Mr. Presley appealed to the Georgia Court of Appeals, citing in his briefs numerous opinions of this Court, including Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984); Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); and Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986).[5] The Georgia Court of Appeals nevertheless applied an "abuse of discretion" standard of review, and held that "[t]here was no abuse of discretion here, when the trial court explained the need to exclude spectators at the voir dire stage of the proceedings and when members of the public were invited to return afterward." Presley v. State, 290 Ga. App. 99, 100-101, 658 S.E.2d 773, 775 (App. 9-10) (2008).

On certiorari review to the Georgia Supreme Court, Mr. Presley again cited in his briefs the same aforementioned opinions of this Court.[6] The majority

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[5] To enhance clarity, the 1984 Press-Enterprise decision will hereafter be cited as Press-Enterprise I, and the 1986 decision as Press-Enterprise II.

[6] Indeed, Mr. Presley presented, in his initial substantive brief to the Georgia

acknowledged the federal constitutional right to a public trial, and directly quoted a Waller test:

> to exclude the public from a trial, there must be "an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."

Presley, 285 Ga. at 272, 674 S.E.2d at 911 (App. 3) (quoting Waller, 467 U.S. at 48, 104 S.Ct. 2210). The majority below found that "the trial court certainly had an overriding interest in ensuring that potential jurors heard no inherently prejudicial remarks from observers during voir dire." Id. But it gave only passing reference to the quoted Waller requirement that this interest must have been "likely to be prejudiced."

Supreme Court, the very arguments presented by this petition. He specifically argued that

> [t]he trial court's fear of jury contamination was ... entirely based upon the speculative premise that anyone who is interested enough to watch a trial must necessarily be too interested in the case to be permitted to watch the voir dire. There was no evidence, allegation, or even rumor of any prior or planned misconduct by any member of Mr. Presley's family, by anyone even remotely connected to the case, or even by any member of the general public.

And he further specifically contended that "[t]hose seeking closure carry the burden to demonstrate that no means available other than closure of the hearing will serve to protect the asserted interest. Those opposing closure have no burden to provide or suggest alternatives to closure."

The majority thereafter discussed the "reasonable alternatives" prong: "It has been noted that, although Waller declared that trial courts are to consider alternatives to closure, the United States Supreme Court did not provide clear guidance regarding whether a court must, sua sponte, advance its own alternatives to" closure. 285 Ga. at 273, 674 S.E.2d at 911 (App. 4). The majority resolved this ambiguity in favor of courtroom closures, ruling that "the party opposed to closing the proceeding must alert the court to any alternative procedures that allegedly would equally preserve the interest." Id. The majority affirmed, finding that "no alternatives were suggested to the court." Id.

The dissent would have resolved this ambiguity in favor of open courtrooms, requiring trial courts to consider all reasonable alternatives to closure, not just those presented to the court. 285 Ga. at 274-75, 674 S.E.2d at 912-13 (App. 5-6) (Sears, C.J., dissenting). And the dissent was troubled by the broad reach of the majority opinion:

> this case involves voir dire in a garden variety drug trafficking case no different than hundreds or perhaps even thousands of similar cases pending on the dockets of trial courts throughout this state. The majority today gives the trial courts in these cases the green light to exclude the public entirely from voir dire in all of them, contrary to the express commands of the Sixth Amendment.

285 Ga. at 276, 674 S.E.2d at 913 (App. 7).

Mr. Presley filed a timely motion for reconsideration. The Georgia Supreme Court denied Mr. Presley's motion for reconsideration on April 10, 2009. App. 16.

REASONS FOR GRANTING THE PETITION

This case addresses a most critical right: the right to a public trial. This Court has repeatedly recognized the fundamental nature of this right, noting, for example, that "the presumptive openness of the trial [has been called] 'one of the essential qualities of a court of justice,'" and "an indispensible attribute of an Anglo-American trial." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 567 & 569, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (plurality opinion).

This Court has observed "the importance of openness to the proper functioning of a trial; it [gives] assurance that the proceedings [are] conducted fairly to all concerned, and it discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality." Id. at 569, 100 S.Ct. 2814. Accord Waller v. Georgia, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (collecting similar pronouncements from the decisions of this Court). Indeed,

> [w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.

Id. (quoting J. Bentham, Rationale of Judicial Evidence 524 (1827)).

I. Most courts have required case-specific evidence that there is an actual, substantial probability of harm to the interest sought to be protected by a courtroom closure. But the Georgia Supreme Court approves closures based on nothing but amorphous possibilities. This Court should grant the writ of certiorari to clarify whether case-specific evidence is required, and to protect the critical right to a public trial.

The Sixth Amendment right to a public trial is a fundamental right, but it is not absolute. Valid closures "will be rare, however, and the balance of interests must be struck with special care." Waller v. Georgia, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). When, then, can a trial be properly closed?

This Court discussed various statements of the test in Waller. It held that

> [t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Id. (quoting Press-Enterprise I, 464 U.S. 501, 510, 104 S.Ct. 819 (1984)). This Court stated the test alternatively:

> the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Id. at 48, 104 S.Ct. 2210.

Under either formulation, there must be real evidence that the "higher values" or the "overriding interest" is subjected to some actual danger. Closure

must be either "essential to preserve" the overriding interest, or the overriding interest must at least be "likely to be prejudiced." And in a subsequent case, this Court clarified: the likelihood of danger must meet a "'substantial probability' test which we hold is called for by the First Amendment." Press-Enterprise II, 478 U.S. 1, 14, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986).[7]

Most courts applying the "substantial probability" test have required the proponent of closure to provide at least some case-specific evidence.[8] And lower

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[7] Although in Press-Enterprise II this Court referenced the First Amendment, it is clear from this Court's precedent that the Sixth Amendment must require at least the same quality of evidence. After all, in Waller, this Court explicitly adopted in toto the tests it had previously developed in the First Amendment context: "we hold that under the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests set out in Press-Enterprise[II] and its predecessors." 467 U.S. at 47, 104 S.Ct. 2210. And the first Waller formulation of the test is a direct quote from Press-Enterprise I, while the second begins with the phrase "Under Press-Enterprise [II], ..." Id. at 45 and 48, 104 S.Ct. 2210.

Indeed, "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." Id. at 46, 104 S.Ct. 2210.

[8] E.g. Davis v. Reynolds, 890 F.2d 1105, 1110 (10th Cir. 1989) (even "compelling interest[s]" can "support a closure only when they form part of a careful case-by-case analysis of each individual situation. They do not justify an automatic, general exclusion of

courts have applied this requirement for actual evidence in the specific context presented by this case, where the asserted interest is the interest in avoiding contamination of jurors. For example, the Illinois Appellate Court held that

> [t]he closure of a trial to the public to prevent contamination of potential jurors facially meets the requirement of an overriding interest. However, the

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the public in every case"); People v. Martinez, 82 N.Y.2d 436, 442, 624 N.E.2d 1027, 1030, 604 N.Y.S.2d 932, 935 (1993) ("a trial court's own impressions of the general vicissitudes of undercover narcotics work do not suffice for closure. 'There should have been a factual showing that an exception to the norm of a public trial was justified'") (quoting People v. Jones, 47 N.Y.2d 409, 415, 391 N.E.2d 1335, 1339, 418 N.Y.S.2d 359, 363, cert. denied, 444 U.S. 946, 100 S.Ct. 307, 62 L.Ed.2d 315 (1979)); State v. Mahkuk, 736 N.W.2d 675, 685 (Minn. 2007) ("The problem is that, while ... '[p]rotecting witnesses from intimidation or retaliation is an overriding state interest,' there is no evidence from any witness asserting that a witness had been intimidated or threatened"); Brown v. Artuz, 283 F.3d 492, 501 (2nd Cir. 2002) ("The safety of a police officer working undercover surely constitutes an overriding interest. Of course, the mere invocation of officer safety does not justify the closing of a courtroom. Under the first prong of Waller, an officer must show facts that tend to support his fear"). See also Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 611 n. 27, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) (holding a mandatory closure statute unconstitutional because it required no particularized determinations in individual cases). But see Abraham G. Gerges, A Judicial Dilemma, 211 N.Y.L.J. 83:2 (1994) (noting that trial judges "routinely" close courtrooms during the testimony of undercover officers in New York).

> record here fails to reveal a scintilla of evidence reasonably necessary to meet the "likely to be prejudiced" requirement. The record discloses only that it was the judge's policy ("I do it for every trial") to exclude family members from the jury selection part of trial to avoid the possibility of their comments or actions influencing the jurors. The record is devoid of any evidence of a reasonable likelihood that defendant's siblings would attempt to influence the jurors.

People v. Taylor, 244 Ill.App.3d 460, 467-68, 612 N.E.2d 543, 548-49, 183 Ill.Dec. 891, 896-97 (1993). Accord State v. Cuccio, 350 N.J.Super. 248, 265, 794 A.2d 880, 890 (2002) ("a trial judge's effort to prevent contamination of potential jurors tends to satisfy the 'overriding interest' requirement of the Waller test, if it is premised upon a specific finding of need that has a basis in actual fact. The record in this matter does not disclose that the jury selection process was 'likely to be prejudiced' by the presence of the families and other spectators in the courtroom"); Commonwealth v. Johnson, 309 Pa.Super. 367, 384, 455 A.2d 654, 662-63 (1982) (one "reason [given for the closure] was that 'we are not going to have any intimidation of jurors during the time they are being selected.' But the record discloses no reason to suppose that permitting the public to be present would have resulted in any intimidation"); People v. Willis, 274 Ill.App.3d 551, 554, 654 N.E.2d 571, 573, 211 Ill.Dec. 109, 111 (1995) (finding that "prevent[ing] contamination of potential jurors .... satisfies the overriding interest requirement," but reversing because "the record fails to show that the jury selection proceedings were likely to be prejudiced").

But the Georgia Supreme Court has given trial courts carte blanche to close courtrooms on paltry, non-specific "evidence." The majority below's entire discussion of Waller's first prong (after quoting Waller) follows:

> Here, the trial court certainly had an overriding interest in ensuring that potential jurors heard no inherently prejudicial remarks from observers during voir dire. And, the trial court based its decision to exclude observers on the fact that, given the arrangement of the courtroom, observers would be "intermingle[d]" with the potential jurors, and explained this concern to counsel.

Presley v. State, 285 Ga. 270, 272, 674 S.E.2d 909, 911 (App. 3) (2009) (citation omitted). In a footnote, the majority further explained:

> This Court has long recognized the trial court's interest in isolating jurors from public remarks.
> In Myers v. State, 97 Ga. 76(5), 77, 25 S.E. 252 [(1895)], it was held: "While every person accused of crime is entitled to a public trial, it is not necessary to its legality that a great multitude should be in attendance, and the presiding judge should not permit the bar or court-room to become so crowded as to impede the progress of the trial by rendering it difficult for the jurors to enter or leave the box, or by preventing the free movement of counsel and witnesses; moreover, the jury should not be in such close and constant contact with the audience as that remarks of bystanders as to the guilt or innocence of the accused, or other indications of public feeling for or against him, may reach their ears or come under their observation."

285 Ga. at 272 n. 3, 674 S.E.2d at 911 n. 3 (App. 3).

In short, the evidence found sufficient by the Georgia Supreme Court consists entirely of the fact that "observers would be 'intermingle[d]' with the potential jurors" and that in such a situation "remarks of bystanders ... may reach [the jurors'] ears or come under their observation." There is, in this case, absolutely no

evidence that Mr. Presley's uncle (or any member of his family or any of the other spectators) had any propensity, plan, or likelihood to taint the jury pool.[9] And the unrebutted record evidence demonstrates that there was ample space in the courtroom, such that the "intermingl[ing]" in this case would be no more than the "intermingl[ing]" necessitated by almost any jury trial.[10]

Our constitution requires that voir dire be presumptively open to the public. Press Enterpise I, 464 U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). But the Georgia Supreme Court has turned Press Enterprise I on its head -- voir dire in Georgia is now presumptively closed, not presumptively open.

The majority below accomplished this feat by finding the first two Waller factors satisfied by the mere existence of voir dire, and by shifting the burden on the final Waller factor to the opponent (if any) of closure. The majority found the avoidance of possible contamination of the jurors to be a sufficiently overriding interest to close voir dire. Presley, 285 Ga. at 272, 674 S.E.2d at 911 (App. 3). It requires no further showing to meet the first prong of the Waller test, effectively giving the opinion below universal application, and ensuring that its generic

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[9] The dissent below noted that the closure "was not required by space considerations, nor was the closure prompted by specific conduct by any of the spectators in the courtroom." 285 Ga. at 274, 674 S.E.2d at 912 (App. 5) (Sears, C.J., dissenting).

[10] As demonstrated supra pages 5-6, only the slightest "intermingl[ing]" was involved here. The spectators were separated from one section of the jurors by a twelve foot corridor, and from the other section by two empty rows of benches.

"overriding interest" will override in nearly every Georgia trial. And so long as only voir dire is closed, the Georgia Supreme Court has decreed that such closures per se meet the "no broader than necessary" test.[11] Id.

The end result of these findings is that voir dire in Georgia is now presumptively[12] closed -- or at least presumptively closable -- at the whim of the trial judge. Indeed, the Georgia Supreme Court affirmed a trial court that

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[11] Compare In re Orange, 152 Wash.2d 795, 809-811, 100 P.3d 291, 298-99 (2004) (reversing a conviction because the trial court could have called a panel of 90 jurors, rather than 98, thereby allowing room for family members; and also because the exclusion was "broader in scope and duration than ... necessary" in that "[a] reasonably tailored order would have, at a minimum, ... clearly and specifically provided that, as prospective jurors were excused from the crowded courtroom, additional spectators could be admitted to take the available seats or standing positions"); State v. Torres, 844 A.2d 155, 160 (R.I. 2004) (reversing because "at least two empty seats .... remained vacant despite the presence of the family members in the courthouse and their desire to attend the seating of the jury"); Williams v. State, 736 So. 2d 699, 704 (Fla. App. 1999) (reversing because "the trial court's total closure of the courtroom [during voir dire] was broader than necessary ... in that it appears three chairs could have been set up in the back of the courtroom to accommodate Williams' family without any serious breach of safety measures").

[12] This presumption of closure is, at least, not a wholly irrebuttable presumption. The Georgia Supreme Court acknowledges that the presumption might be rebutted if an opponent of closure happens to be present and immediately suggest a reasonable alternative to the closure.

shamelessly and routinely closed voir dire as a matter of standing policy.[13]

This Court should grant the writ of certiorari to clarify that real, case-specific evidence is necessary to satisfy Waller's "likely to be prejudiced" prong. This Court should grant the writ of certiorari to protect the fundamental right to a public trial.

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[13] The trial court explicitly stated that other judges "may have different policies, but I don't permit family members or witnesses for the State or either side to intermingle or sit on the rows with the jurors." (App. 38). That "I don't think it's a good policy and I don't think jurors should be intermingled with family members or witnesses should sit close enough to them that they can overhear their comments. When the jury goes on breaks, the family members go on breaks with them, go into the same bathrooms with them talking about the case." (App. 39). That "it's totally up to my discretion whether or not I want family members in the courtroom to intermingle with the jurors and sit directly behind the jurors where they might overhear some inadvertent comment or conversation." (App. 42-43). And that "even if [the State has] interns who want to observe a trial, they can't sit out with the jury." (App. 50).

II. The Georgia Supreme Court noted that this Court has not yet provided "clear guidance" regarding the proper assignment of the burden to keep our courtrooms open. Many courts hold that the opponent of closure must suggest alternatives to closure. But numerous other courts have held that those seeking to exclude the public must show that there is no available less-intrusive alternative. This Court should grant the writ of certiorari to resolve this split of authority, and to provide the guidance sought by the lower courts.

"It has been noted that, although Waller declared that trial courts are to consider alternatives to closure, the United States Supreme Court did not provide clear guidance regarding whether a court must, sua sponte, advance its own alternatives to" closure.[14] Presley v. State, 285 Ga. 270, 273, 674 S.E.2d 909, 911 (App. 4) (2009).

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[14] Reasonable alternatives to closure abound in this case. As Mr. Presley put it in his initial brief to the Georgia Supreme Court:

> The trial court could have moved just three chairs and thereby placed all the jurors on one side of the courtroom, and all the observers on the opposite side, or it could have placed chairs elsewhere inside the courtroom for Mr. Presley's family. The trial court could have split the venire into two panels, thereby dramatically reducing the number of jurors in the audience and thereby increasing the buffer zone between the jurors and the spectators.
>
> Alternatively, the trial court could have emphatically warned Mr. Presley's family that any attempt to influence the jury, and indeed anything but absolute silence, was punishable by jail for contempt of court. The trial court could have instructed the jury, as it did later, to report any contact or any other questionable behavior by anybody in or out of the courtroom. The trial court could have requested an additional deputy during the voir dire process to monitor the spectators.
>
> And even if all these alternatives failed to achieve the desired result, the trial court still had two other alternatives: it could excuse the contaminated jurors, or, in the worst of cases, it could grant a mistrial.

The "emerging view [among the lower courts is that] the trial court is not required to consider alternatives unless the party opposing the closure so urges; this duty does not arise sua sponte." State v. Brown, No. 73060 (Ohio Ct. App., Nov. 25, 1998) (unpublished). "Most courts have stressed that the press bears 'the burden of showing that reasonable alternatives to closure are available.' We shall abide by the majority view that the burden of demonstrating reasonable alternatives to closure rests with the press." NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal.4th 1178, 1218 n. 40, 86 Cal.Rptr.2d 778, 809 n. 40, 980 P.2d 337, 365 n. 40 (1999) (citations omitted).

This "emerging view" is hardly universal. Many courts have required that courtroom closures be subjected to truly strict scrutiny.[15] This latter view comports

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[15] E.g. Guzman v. Scully, 80 F.3d 772, 774 & 776 (2nd Cir. 1996) (reversing a conviction where defense counsel made no objection other than that he was opposing the closure, in part because "[t]he third requirement of considering alternatives to closure was not even attempted to be met"); United States v. Peters, 754 F.2d 753, 761 (7th Cir. 1985) (finding error where "sequestration of the entire venire was the only alternative to closure considered by the court. Although the court recognized that sequestration is an extreme measure, and carefully detailed why he would not impose sequestration in this case, he did not consider other alternatives or explain their rejection on the record. Nor did defense counsel, who carried the burden of persuasion as the proponents of closure, explain why other alternatives to closure were unavailable. Absent consideration of alternatives to closure, the trial court could not constitutionally close voir dire. The trial judge had

several alternatives to closure available to him which he did not consider") (citations and internal quotation marks omitted); United States v. Powers, 622 F.2d 317, 325 (8th Cir.) ("The burden, and indeed a heavy burden, rests on a defendant seeking a private or secret trial. The defendant must demonstrate the necessity of closure based upon all three prongs of the test. Not only must the defendant demonstrate a substantial probability of irreparable damage to his fair trial right, he must also show a substantial probability that alternatives to closure do not exist and that closure will be effective in protecting against the perceived harm. A mere demonstration of potential harm to the defendant is insufficient to shift the burden for opposing closure to the Government"), cert. denied, 449 U.S. 837, 101 S.Ct. 112, 66 L.Ed.2d 44 (1980); Oregonian Pub. Co. v. U.S. Dist. Court for Dist. of Oregon, 920 F.2d 1462, 1466-67 (9th Cir. 1990) ("By so concluding, however, the district court imposed the initial burden on the wrong party. Consistent with the presumed right of access to court proceedings and documents under the first amendment as articulated in Press-Enterprise I, the party seeking access is entitled to a presumption of entitlement to disclosure. It is the burden of the party seeking closure, here Wolsky, to present facts supporting closure and to demonstrate that available alternatives will not protect his rights"), cert. denied, 501 U.S. 1210, 111 S.Ct. 2809, 115 L.Ed.2d 982 (1991); Judd v. Haley, 250 F.3d 1308, 1317 (11th Cir. 2001) ("[t]he holding of Waller thus requires the court and the party seeking a total closure to take affirmative steps ensuring that closing the courtroom is the least restrictive way to protect another valuable interest, an interest so valuable that it supersedes the rights of the defendant and the public to open proceedings in matters of public record. The absence of any evidence that these affirmative

steps were taken, on the face of the record, cuts in favor of the party objecting to closure of the courtroom, not in favor of those who sought the closure") (emphasis in original); Arkansas Television Co. v. Tedder, 281 Ark. 152, 157, 662 S.W.2d 174, 176 (1983) ("in order to overcome the presumption of open pretrial hearings, the proponent of closure must demonstrate a substantial probability that (1) irreparable damage to the defendant's fair trial right will result from an open hearing and (2) alternatives to closure will not adequately protect the right to a fair trial"); Boston Herald, Inc. v. Sharpe, 432 Mass. 593, 605 n. 24, 737 N.E.2d 859, 868 n. 24 (2000) ("The burden falls on the party seeking closure to demonstrate that (1) there exists a substantial probability that permitting access to court records will prejudice his fair trial rights; (2) closure will be effective in protecting those rights, and that the order of closure is narrowly tailored to prevent potential prejudice; and (3) there are no reasonable alternatives to closure"); Carter v. State, 356 Md. 207, 216-17, 738 A.2d 871, 876 (1999) ("The party moving for closure has the burden of proving that "higher values" will be infringed by publicity; that closure of the courtroom will prevent such pr dice; and that reasonable alternatives to closure cannot protect the asserted values.... In the case sub judice, an accused asserts his Sixth Amendment right to a public trial in opposition to closure. We believe, and so hold, that the same analysis applies"); Walker v. State, 125 Md. App. 48, 75, 723 A.2d 922, 935-36 (1999) (reversing a conviction in part for failure to consider alternatives to closure, and listing several alternatives to closure that had not been considered by the trial court, and which the recitation of facts reveals had never been mentioned by the defendant); Watters v. State, 328 Md. 38, 45, 612 A.2d 1288, 1291 (1992) ("even if the State could show that under the

with this Court's pronouncements on the subject, as recognized by Ayala v. Speckard, 131 F.3d 62, 71 (2nd Cir. 1997) (en banc) (affirming convictions due to the minimal closures involved, but noting that a different standard might apply to more substantial closures: "Since none of the alternatives that the Supreme Court identified in Press-Enterprise I, Press-Enterprise II, or Waller had been suggested by any of the parties, it is arguable that the Court expects trial courts to consider lesser alternatives sua sponte only before taking the extreme step of closing an

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circumstances then prevailing the government had a legitimate interest in preventing overcrowding, it could not show that the exclusion of all persons was a narrowly tailored means of protecting that interest. There was no effort to ensure that petitioner's family could be present while the jury was selected"), cert. denied, 507 U.S. 1024, 113 S.Ct. 1832, 123 L.Ed.2d 460 (1993); In re Orange, 152 Wash.2d 795, 801 & 809-10, 100 P.3d 291, 294 & 298 (2004) (reversing, despite the trial court's assertion that "this entire courtroom will be filled with the venire," because "[i]nherent in the ... reason, 'the limitation of space,' was the trial judge's interest in accommodating as a single group the entire 98-member jury pool. The court did not explain ... why the venire could not have been divided" into groups that would not have filled the courtroom). See also Tinsley v. U.S., 868 A.2d 867, 879 (D.C. Cir. 2005) (finding that no reasonable alternatives existed, but stating: "we are not so sure that a trial judge should be absolved from considering even the most obvious reasonable alternatives to exclusion of the public that may be available merely because the parties have failed to propose them. To take that position would be to slight the independent public interest in an open courtroom").

entire proceeding"), cert. denied, 524 U.S. 958, 118 S.Ct. 2380, 141 L.Ed.2d 747 (1998).[16]

This Court has made it clear that courtroom closures must be subjected to "strict scrutiny." Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 607 n. 17, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982). Globe Newspaper established that

> the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one.... [I]t must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.

Id. at 606-07, 102 S.Ct. 2613. This Court has consistently used this "narrowly tailored" language, demonstrating its intent that courtroom closures be subjected to strict scrutiny. E.g. Press-Enterprise I, 464 U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (for the public to be excluded, "it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to

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[16] Note that Ayala was a mere "partial" closure case, and explicitly did not address "complete" closures. See id. ("In the pending cases, however, we need not decide whether a sua sponte obligation to consider alternatives to complete closure exists because the trial judges in these cases took the far lesser step of closing the courtroom only during the testimony of one witness"); State v. Cuccio, 350 N.J.Super. 248, 268, 794 A.2d 880, 892 (2002) (distinguishing Ayala, in a case involving a voir dire closure, because Ayala involved only a "limited closure").

serve that interest") (emphasis added); Press-Enterprise II, 478 U.S. 1, 15, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986).

Indeed, Globe Newspaper Co.[17] explicitly derives its test from classic First Amendment strict scrutiny cases. See 457 U.S. at 607, 102 S.Ct. 2613 (citing, e.g., Brown v. Hartlage, 456 U.S. 45, 53-54, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982) ("the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression"); Smith v. Daily Mail Pub. Co., 443 U.S. 97, 102, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979) ("a state ... must nevertheless demonstrate that its punitive action was necessary to further the state interests asserted")).

It is clear that this Court intended courtroom closures to be subjected to strict scrutiny. Strict scrutiny, of course, places the burden squarely upon those seeking to curtail the protected right to demonstrate that there are no "other, reasonable ways to achieve [their] goals." Dunn v. Blumstein, 405 U.S. 330, 343, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). They must act with "precision" and in a narrowly tailored fashion. Id.

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[17] There is no room for doubt that the Globe Newspaper Co. formulation is the source for Waller's test. Waller cites Press Enterprise I (and also Globe Newspaper Co.) as the source for its test. Waller v. Georgia, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). Press Enterprise I, in turn, relies solely upon Globe Newspaper Co. Press Enterprise I, 464 U.S. at 509-10, 104 S.Ct. 819.

But it is not just the origins of the test that demonstrate that this Court intended courtroom closures to receive strict scrutiny. The test itself demonstrates that courtrooms can be closed only when closure is demonstrably necessary. A comparison of the two formulations of Waller's test demonstrates that this Court must not have intended the burden to fall on the opponents of closure. One formulation explicitly mentions alternatives, but does not require any finding that such a closure is "essential":

> the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Waller v. Georgia, 467 U.S. 39, 48, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

The other formulation does not mention alternatives, instead replacing that concept with the requirement that closure be "essential":

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Id. at 45, 104 S.Ct. 2210 (quoting Press-Enterprise I, 464 U.S. 501, 510, 104 S.Ct. 819 (1984)).

In other words, the "alternatives" prong of one formulation is directly interchangeable with the "essential" prong of the other.[18] Could this Court really have intended the burden of negating the "essential" prong to fall upon the opponents of closure? Can it really be proper to indiscriminately close courtrooms unless and until someone demonstrates that such closure is unnecessary? Or put another way, how could a trial court possibly determine that closure is "essential" if it fails to consider alternatives that could render such closure unnecessary?

The issues presented herein grow more compelling with each passing day. Our traditional press is slowly disappearing, swallowed by our nation's transformation to the digital age. Newspapers are gradually shutting down, being replaced by independent bloggers. The days of powerful newspapers with ample legal budgets appear to be numbered. Will underfunded bloggers be able to carry the financial burden of opening our courtrooms?

And what of the routine cases, like this one, that do not generate press interest? What of those cases where the defendant seeks closure, so as to avoid pretrial publicity? E.g. Press Enterprise II, 478 U.S. at 3, 106 S.Ct. 2735. Who will vindicate the right of our citizens to attend such criminal trials? If trial courts are given free rein to abdicate their responsibility in such cases, open courtrooms may

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[18] Apart from this interchangeable alternatives/essential prong, the remainder of the two formulations are nearly identical: both contain the "overriding interest" prong, a requirement that the closure be narrowly tailored, and requirement of specific findings of fact.

become the aberration, rather than the norm.

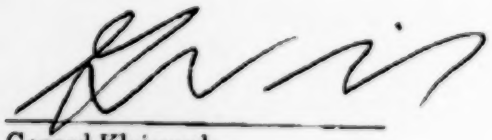
This Court has held that when a trial court considers courtroom closure, "the balance of interests must be struck with special care." Waller, 467 U.S. at 45, 104 S.Ct. 2210. This Court should grant the writ of certiorari to reaffirm that "special care" is still required; that criminal trials cannot be closed except where closure is truly "essential."

CONCLUSION

The Georgia Supreme Court has approved the routine closure of voir dire to the public, on the grounds that the trial court has an overriding interest in avoiding contamination of the jurors. No case-specific findings are needed to support such closure. This ruling conflicts with the opinions of numerous federal Courts of Appeal and state appellate courts that do require case-specific findings. This Court should grant the writ of certiorari to resolve this conflict and to protect the fundamental right to a public trial.

A considerable number of federal and state appellate courts have held that those seeking to exclude the public from our courtrooms must demonstrate that there is no less intrusive means of protecting their asserted interests. But the Georgia Supreme Court has reached the opposite conclusion, joining what has been called the "emerging view" and even the "majority view." This Court should grant the writ of certiorari to end this conflict in the lower courts, and to provide the "clear guidance" that the Georgia Supreme Court determined was lacking.

Respectfully submitted, this 9th day of July, 2009.



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APPENDIX

October Term, _____

UNITED STATES SUPREME COURT

ERIC PRESLEY,
Petitioner

v.

STATE OF GEORGIA,
Respondent

On Petition for Writ of Certiorari
to the Georgia Supreme Court

APPENDICES TO THE PETITION FOR CERTIORARI

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* The motion for new trial hearing addressed five issues, only one of which is implicated by this petition. To limit the appendix to relevant materials, Mr. Presley has omitted those portions of the transcript that do not involve the courtroom closure issue. He has likewise omitted those portions of the trial transcript which are not relevant here.

v. Laurens County, 265 Ga. 404 (2) (456 SE2d 581) (1995) (county employees had official immunity although they failed to follow official procedures to replace stop signs). Moreover, inspecting tires was only one aspect of the entire inspection which included checking the proper functioning of brakes, lights, exhaust systems, windows, etc. It would be severely overreaching for courts to determine the applicability of official immunity by picking and choosing which portions of an entire inspection are discretionary and which portions are not. Accordingly, I would reverse the judgment in Case No. S08G1056 and reinstate the trial court's grant of summary judgment to Mr. Shepard.

I am authorized to state that Justice Hines joins in this dissent.

DECIDED MARCH 23, 2009 —
RECONSIDERATION DENIED APRIL 10, 2009.

Certiorari to the Court of Appeals of Georgia — 290 Ga. App. 345.

Thurbert E. Baker, Attorney General, Kathleen M. Pacious, Deputy Attorney General, Loretta L. Pinkston, Senior Assistant Attorney General, Robert C. Edwards, Assistant Attorney General, for Department of Transportation.

James H. Potts II, Sidney L. Moore, Jr., Schenck & Associates, Hollis C. Cobb, for Heller.

Elizabeth B. Chandler, Jerry L. DeLoach, Laura Sauriol, for City of Atlanta.

Susan K. Moore, James F. Grubiak, amici curiae.

S08G1152. PRESLEY v. THE STATE.

HINES, Justice.

The Court granted a writ of certiorari to the Court of Appeals in *Presley v. State*, 290 Ga. App. 99 (658 SE2d 773) (2008), to review its ruling that the trial court did not err in ordering that spectators be excluded from the courtroom during jury voir dire in Eric Presley's trial for cocaine trafficking, which resulted in his conviction. Finding no infirmity in the trial court's directive, we affirm.

At Presley's trial, before the prospective jurors were brought into the courtroom for jury voir dire, the trial court inquired of a

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throughout the year. The taxi driver in this case was often cited for follow-up inspections. Furthermore, the trigger for inspection is only relevant if the municipal inspector *fails to inspect* when required to do so. See *Clive v. Gregory*, 280 Ga. App. 836 (635 SE2d 188) (2006). The case sub judice involves the alleged failure to *properly* inspect. See *Kodares v. Gwinnett County*, supra, 220 Ga. App. at 851.

courtroom observer: "Now, the gentleman in the black shirt, sir, do you have a case or . . . ," which elicited the response: "No, I'm just here." The trial court replied: "The reason I say that is for all the other observers in the courtroom, when I — when the jurors come up, they will be sitting on those rows, and you can't sit on the same rows with the jurors."

After an unrecorded colloquy, the court said: "And, and the gentleman in the black shirt, you should not hang around on the sixth floor. He can go down to the, maybe the snackbar? . . . Is he a witness? Are you a witness?" The observer replied: "No, I'm Mr. Presley's uncle." The court said:

> Okay. Well, you still can't sit out in the audience with the jurors. You know, most of the afternoon actually we're going to be picking a jury. And we may have a couple of pre-trial matters, so you're welcome to come in after we plete [sic] — complete selecting the jury this afternoon. But, otherwise, you would have to leave the sixth floor, because jurors will be all out in the hallway in a few moments. That applies to everybody who's got a case.

Presley's counsel objected to "the exclusion of the public from the courtroom." The court responded:

> I'm not excusing the public from the courtroom. There just isn't space for them to sit in the audience. We have very small courtrooms, and the witnesses and relatives cannot sit in the audience beside the potential jurors. That will be grounds for a mistrial, and because of a tainted jury panel.

Presley's counsel then said: "Well, I'm wondering, Your Honor, whether . . . some accommodation could not be made for both, some of those members of the family and the jurors?" The court answered:

> Well, the uncle can certainly come back in once the trial starts. There's no, really no need for the uncle to be present during jury selection. When the trial starts, he can certainly come back into the courtroom. But he — we have 42 jurors coming up. Each of those rows will be occupied by jurors. And his uncle cannot sit and intermingle with members of the jury panel. But, when the trial starts, the opening statements and other matters, he can certainly come back into the courtroom.

Presley took exception to the court's ruling.

After his conviction, Presley moved for a new trial on the general grounds, and amended that motion to include the ground that the trial court erred in "refusing to make an accommodation" so as to allow observers at all phases of his trial. At the hearing on the motion for new trial, Presley presented evidence regarding how many persons could be seated in the courtroom's four rows of seats; he asserted that 58 could be comfortably accommodated, and contended that additional seating could have been brought into the courtroom to accommodate observers and potential jurors.[1]

A criminal defendant has the right to a public trial under the Sixth and Fourteenth Amendments to the Constitution of the United States. *Waller v. Georgia*, 467 U. S. 39 (104 SC 2210, 81 LE2d 31) (1984).[2] This right extends to the proceedings of jury voir dire and selection. Id. at 45-46. See also *Press-Enterprise Co. v. Superior Court of California*, 464 U. S. 501, 510 (104 SC 819, 78 LE2d 629) (1984). Under *Waller*, to exclude the public from a trial, there must be "an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." Id. at 48 (II) (B). Here, the trial court certainly had an overriding interest in ensuring that potential jurors heard no inherently prejudicial remarks from observers during voir dire. See *Sharpe v. State*, 272 Ga. 684, 687-688 (5) (531 SE2d 84) (2000).[3] And, the trial court based its decision to exclude observers on the fact that, given the arrangement of the courtroom, observers would be "intermingle[d]" with the potential jurors, and explained this concern to counsel. Nor was the trial court's order overbroad; the court made it clear that the exclusion of observers was only for the duration of jury voir dire.

---

[1] No testimony was offered at the hearing on the motion for new trial regarding how many observers were in the courtroom at the time of the trial court's announcement regarding voir dire.

[2] No persons who were excluded from the courtroom have sought relief in this case. Compare *R.W. Page Corp. v. Lumpkin*, 249 Ga. 576 (292 SE2d 815) (1982).

[3] This Court has long recognized the trial court's interest in isolating jurors from public remarks.

> In *Myers v. State*, 97 Ga. 76 (5), 77 (25 SE 252) [(1895)], it was held: "While every person accused of crime is entitled to a public trial, it is not necessary to its legality that a great multitude should be in attendance, and the presiding judge should not permit the bar or court-room to become so crowded as to impede the progress of the trial by rendering it difficult for the jurors to enter or leave the box, or by preventing the free movement of counsel and witnesses; moreover, the jury should not be in such close and constant contact with the audience as that remarks of bystanders as to the guilt or innocence of the accused, or other indications of public feeling for or against him, may reach their ears or come under their observation."

Moore v. State, 151 Ga. 648, 654-655 (108 SE 47) (1921).

Nonetheless, Presley asserts that the trial court's action was infirm because the trial court did not consider any alternatives to excluding all observers. However, no alternatives were suggested to the court; Presley's only reference regarding the subject was a nebulous request for "accommodation . . . for both, some of those members of the family and the jurors?" It has been noted that, although *Waller* declared that trial courts are to consider alternatives to closure, the United States Supreme Court did not provide clear guidance regarding whether a court must, sua sponte, advance its own alternatives to it. See *Ayala v. Speckard*, 131 F3d 62, 70-72 (II) (B) (2nd Cir. 1997) (addressing closure during the period of time that undercover police witnesses were testifying). In that regard, we are persuaded by the reasoning of *People v. Ramos*, 685 NE2d 492 (N.Y. 1997), that, when a court is considering whether to close a portion of the proceedings, and there is no discussion on the record regarding alternative actions,[4] "it can be [inferred] that the trial court, in ordering closure, determined that no lesser alternative would protect the articulated interest. [Cits.]" Id. at 504. See also *Ayala*, supra. Accordingly, it is appropriate to "conclude that, where the factual record permits closure and the closure is not facially overbroad, the party opposed to closing the proceeding must alert the court to any alternative procedures that allegedly would equally preserve the interest. [Cit.]" *Ramos*, supra at 504.

> Any other rule would place an impractical — if not impossible — burden on trial courts . . . . Even if the court were to hold a separate hearing on the issue, or itself consider and reject some alternatives to closing the proceeding, a defendant on appeal could likely always [suggest another alternative]. Under these circumstances, placing the onus wholly on trial courts would provide an incentive for defendants to remain silent. [Cit.]

Id. at 505.

Ruling that, in these circumstances, Presley was obliged to present the court with any alternatives that he wished the court to consider, recognizes the general appellate precept that one who objects to an action of the trial court must raise the issue at the time of the trial court's action, so as to afford the court the opportunity to take any appropriate remedial action, or else forfeit review. See *White v. State*, 281 Ga. 276, 280 (5) (637 SE2d 645) (2006). It also is consistent with the long-standing principle that

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[4] *Ramos* also observed that "*Waller* . . . does not hold that the trial court must explicitly consider alternatives on the record." Supra at 503.

> [t]he conduct of the trial of any case is necessarily controlled by the trial judge, who is vested with a wide discretion and in the exercise of which an appellate court should never interfere unless it is made to appear that wrong or oppression has resulted from its abuse.

Lemley v. State, 245 Ga. 350, 353-354 (3) (264 SE2d 881) (1980). (Citations and punctuation omitted.) When neither the defendant nor the State directs the court's attention to alternatives, there is no abuse of discretion in the court's failure to sua sponte advance its own alternatives.[6]

Judgment affirmed. All the Justices concur, except Sears, C. J., and Hunstein, P. J., who dissent.

SEARS, Chief Justice, dissenting.

A room that is so small that it cannot accommodate the public is a room that is too small to accommodate a constitutional criminal trial.[6] Here, however, it is clear from the pictures in the record that complete closure to the public of a critical portion of the trial — voir dire — was not required by space considerations, nor was the closure prompted by specific conduct by any of the spectators in the courtroom. Instead, it was the trial court's sole decision to conduct voir dire with 42 potential jurors in the courtroom at a time that created the overcrowding problem, a decision wholly within the trial court's control.

The majority acknowledges that the trial court did not consider any alternatives to closure. The trial court believed — erroneously — that the constitutional commands to keep criminal trials open to the public do not apply to voir dire.[7] The failure to consider alternatives sua sponte — after announcing at the outset of trial that it planned to close voir dire to the public entirely — is a clear violation of the United States Supreme Court's decision in *Waller v. Georgia* and our own decision in *R.W. Page Corp. v. Lumpkin*.[8] The Supreme Court held in *Waller* that "the trial court *must* consider reasonable

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[5] Presley asserts that the "movant" wishing closure has certain burdens that were not met in this case. See *R.W. Page Corp.*, supra. As in *Berry v. State*, 282 Ga. 376, 378-380 (3) (651 SE2d 1) (2007), neither *party* moved for closure - the State was silent during the relevant exchange - and we will not characterize the trial court's role as that of "movant" under *Lumpkin*.

[6] U. S. Const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . . ."), Ga. Const. of 1983, Art. I, Sec. I, Par XI (a) ("In criminal cases, the defendant shall have a public . . . trial . . . .").

[7] *Press-Enterprise Co. v. Superior Court of California*, 464 U. S. 501, 511 (104 SC 819, 78 LE2d 629) (1984) (holding Sixth Amendment right to a public trial extends to voir dire).

[8] *Waller v. Georgia*, 467 U. S. 39 (104 SC 2210, 81 LE2d 31) (1984); *R.W. Page Corp. v. Lumpkin*, 249 Ga. 576 (292 SE2d 815) (1982). In *Waller*, the Court held that closure of any

alternatives to closing the proceeding."[9] In *Lumpkin*, we emphasized that Georgia trial judges have even less discretion in this area than their federal counterparts do before stating the following:

> While federal trial court judges are admonished to *consider* jury sequestration (or some other remedy) as an alternative to the closing of hearings to the public and the press, we now hold that a Georgia trial court judge shall *use* jury sequestration (or some other means) to exclude prejudicial matters from the jury's knowledge and consideration unless for some reason fully articulated in his findings of fact and conclusions of law jury sequestration (or another remedy) would not adequately protect the defendant's right to a fair trial.[10]

Waller and *Lumpkin* are controlling and mandate reversal here.

The majority excuses the trial court's failure to consider alternatives to closure on the ground that none were suggested to it. The majority thus shifts from the trial court to the defendant the burden of coming up with alternatives to closure as a prerequisite for securing a public trial. However, Presley's counsel had no advance notice that the trial court intended to close voir dire to the public, and thus it can hardly be said that the failure of Presley's counsel to come up with specific alternatives on the spot amounted to a knowing, voluntary, and intelligent waiver by Presley of his constitutional right to a public trial.[11]

Second and more importantly, the majority fails to explain why the requirement to consider alternatives to closure should be obviated when it is the trial court rather than a party who initiates it. The constitutional right to a public trial is designed primarily to police the conduct of the judges who preside over them by exposing their actions to public scrutiny.[12] Thus, it would seem even more

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portion of a criminal trial should be "rare" and stated the constitutional test as follows:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

[9] *Waller*, 467 U. S. at 48 (emphasis supplied).

[10] *Lumpkin*, 249 Ga. at 579-580.

[11] *Lumpkin*, 249 Ga. at 579 ("[O]ur constitution commands that open hearings are the nearly absolute rule and closed hearings the *very rarest* of exceptions.") (emphasis supplied).

[12] See, e.g., *In re Oliver*, 333 U. S. 257, 270 (68 SC 499, 92 LE 682) (1948) ("[T]he guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of

important to require specific consideration, on the record, of alternatives when a trial court closes a portion of a trial to the public without any prompting by the parties. That is why we held in *Lumpkin* that even where the prosecution and the defense both agree to closure, the trial court must enter a closure order with "written findings of fact fully articulating the alternatives to closure considered by the trial court and the reason or reasons why such alternative would not afford the movant an adequate remedy."[13] No such order was entered in this case.

Most troublingly, the majority's reasoning permits the closure of voir dire in *every criminal case* conducted in this courtroom whenever the trial judge decides, for whatever reason, that he or she would prefer to fill the courtroom with potential jurors rather than spectators. This case does not involve testimony by an undercover officer whose life would be threatened if the court were not closed during his or her testimony as the cases cited by the majority in support of its position did.[14] It does not involve matters of national security. Rather, this case involves voir dire in a garden variety drug trafficking case no different than hundreds or perhaps even thousands of similar cases pending on the dockets of trial courts throughout this state. The majority today gives the trial courts in these cases the green light to exclude the public entirely from voir dire in all of them, contrary to the express commands of the Sixth Amendment, the Georgia Constitution, *Waller*, and *Lumpkin*. I respectfully dissent.

I am authorized to state that Presiding Justice Hunstein joins in this dissent.

DECIDED MARCH 23, 2009 —
RECONSIDERATION DENIED APRIL 10, 2009.

Certiorari to the Court of Appeals of Georgia — 290 Ga. App. 99.

Gerard B. Kleinrock, for appellant.

Gwendolyn Keyes Fleming, District Attorney, Daniel J. Quinn, Gerald Mason, Assistant District Attorneys, for appellee.

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judicial power.").

[13] *Lumpkin*, 249 Ga. at 580.

[14] *Ayala v. Speckard*, 131 F3d 62, 64-65 (2nd Cir. 1997); *New York v. Ramos*, 685 NE2d 492, 494 (N.Y. 1997).

[juvenile] court may . . . be changed, modified, or vacated on the ground that changed circumstances so require in the best interest of the child."

Based upon this authority, we conclude that the juvenile court is authorized to amend its original order to include a provision requiring E. W. to pay restitution if it finds that there are changed circumstances which require the amendment in order to serve E. W.'s best interest and promote his rehabilitation, as long as the court also complies with the requirements of OCGA § 17-14-10 and there is sufficient evidence to support the amount of restitution ordered. See Divisions 2 and 3, supra. Under such circumstances, the juvenile court will not violate the constitutional prohibition against double jeopardy. See *In re T. B.*, 268 Ga. at 150.

Judgment vacated and case remanded with direction. Andrews, P. J., and Adams, J., concur.

DECIDED MARCH 6, 2008.

Restitution. Henry Juvenile Court. Before Judge Brown.

Joan Russell Risher, for appellant.

Tommy K. Floyd, District Attorney, Thomas L. Williams, Assistant District Attorney, for appellee.

A07A2440. PRESLEY v. THE STATE.

PHIPPS, Judge.

On this appeal from his conviction for cocaine trafficking, Eric Presley argues that the evidence was insufficient, that the trial court erred when it closed voir dire proceedings to the public and when it instructed the jury not to open a package of cocaine during its deliberations, and that trial counsel was ineffective. We find no error and affirm.

On appeal from a criminal conviction, we view the evidence in the light most favorable to the verdict, with the defendant no longer enjoying a presumption of innocence.[1] We neither weigh the evidence nor judge the credibility of witnesses, but determine only whether the evidence was sufficient for a rational trier of fact to find the defendant guilty of the charged offense beyond a reasonable doubt.[2]

So viewed, the record shows that Presley was under surveillance in the course of a police buy-and-bust operation when he left a

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[1] *Reese v. State*, 270 Ga. App. 522, 523 (607 SE2d 165) (2004).

[2] *Jackson v. Virginia*, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

Wendy's parking lot and drove onto a nearby interstate. Four officers in pursuit saw a white puff rise from the area of Presley's car, pulled over to investigate, and found powder and chunks of suspected cocaine. Two of the officers scraped the white substance off the pavement. The other two officers apprehended Presley, who had bailed out of his car and fled on foot, at his residence. The white substance retrieved from the pavement was later identified as 40.86 grams of 72 percent pure cocaine.

1. The evidence outlined above was sufficient to sustain Presley's conviction for cocaine trafficking.[3]

2. Presley argues that the trial court violated his right to a public trial when it excluded the public from the courtroom during voir dire. We disagree.

> The single purpose for voir dire is the ascertainment of the impartiality of jurors, their ability to treat the cause on the merits with objectivity and freedom from bias and prior inclination. The control of the pursuit of such determination is within the sound legal discretion of the trial court, and only in the event of manifest abuse will it be upset upon review.[4]

The record shows that before conducting voir dire, the trial court asked Presley's uncle to wait outside the courtroom because the limited available seats would be filled with prospective jurors. The trial court told the uncle that although he was "welcome to come in after we complete selecting the jury," he could not "sit and intermingle with members of the jury panel." At the hearing on Presley's motion for new trial, a bailiff testified that the county courtrooms become very crowded during voir dire, that it is difficult to maintain security under those circumstances, and that only one deputy is assigned to each courtroom when a defendant is not in custody. Presley was not in custody at the time of his trial.

There was no abuse of discretion here, when the trial court explained the need to exclude spectators at the voir dire stage of the

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[3] See OCGA § 16-13-31 (a) (1) (defining cocaine trafficking as knowing possession of twenty-eight grams or more of a cocaine mixture with a purity of ten percent or more); *Pitts v. State*, 260 Ga. App. 553, 556 (2) (b) (580 SE2d 618) (2003) (possession of 54 grams of 85 percent pure cocaine was sufficient to sustain conviction notwithstanding the state's failure to test two of three bags of the drug).

[4] *Edmonds v. State*, 275 Ga. 450, 453 (2) (569 SE2d 530) (2002) (citations and punctuation omitted).

proceedings and when members of the public were invited to return afterward.[5]

3. Presley argues that the trial court erred when it instructed the jury not to open the package containing the recovered cocaine. Specifically, he asserts that the jury should have been free to open the package in order to conduct "its own review of the physical evidence." The jury was not equipped to do anything more than scrutinize the package of cocaine, however, and the trial court did not abuse its discretion when it instructed the jury not to open the package.[6]

4. Presley argues that trial counsel was ineffective when he (a) failed to argue that the state's testing of the cocaine was inadequate and neglected to highlight gaps in the chain of custody of the cocaine; (b) failed to object to hearsay evidence concerning the weight of a package of cocaine unrelated to the charge on which Presley was convicted; and (c) failed to object to the court's instruction not to open the package of cocaine. We disagree with these contentions.

To show ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense.[7] The question of ineffectiveness is a mixed one of both law and fact: "we accept the trial court's factual findings and credibility determinations unless clearly erroneous, but we independently apply the legal principles to the facts."[8]

> To show deficient performance, a defendant must overcome the strong presumption that counsel's performance fell within a wide range of reasonable professional conduct and that counsel's decisions were made in the exercise of reasonable professional judgment. The reasonableness of counsel's conduct is examined from counsel's perspective at the time of trial and under the particular circumstances of the case.[9]

(a) At the hearing on Presley's motion for new trial, trial counsel testified that he did not cross-examine the state's laboratory analyst

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[5] See *R. W. Page Corp. v. Lumpkin*, 249 Ga. 576, 581 (9) (292 SE2d 815) (1982) (reversing the entire exclusion of the public, including news media, from a criminal proceeding, but affirming the "traditional right and obligation of the trial court to maintain dignity and decorum in the courtroom, as by excluding from the courtroom overflow audiences").

[6] See Goger, Daniel's Georgia Criminal Trial Practice (2006 ed.), § 24-18, p. 1109, n. 1, quoting American Bar Association Standards, Trial by Jury, Vol. III, Standard 15-4.1 (trial court "in its discretion" may allow evidence, including exhibits, to go out with the jury, taking into account "whether the material may be subjected to improper use").

[7] *Suggs v. State*, 272 Ga. 85, 87-88 (4) (526 SE2d 347) (2000), citing *Strickland v. Washington*, 466 U. S. 668 (104 SC 2052, 80 LE2d 674) (1984).

[8] *Suggs*, supra at 88 (footnote omitted).

[9] *Edwards v. State*, 282 Ga. 259, 262 (8) (646 SE2d 663) (2007) (citations omitted).

concerning her testing of only a small portion of the cocaine because an attack on the analyst's methodology would have been "ludicrous" and likely to alienate a jury. Counsel also testified to his judgment that there had been no significant problems with the chain of custody and that additional cross-examination on the issue might have undermined the credibility of Presley's case. We will not second-guess the trial court's conclusion that these tactical decisions concerning the scope of cross-examination were reasonable.[10]

(b) One of the officers testified that police were surveilling the Wendy's restaurant as part of their buy-and-bust "operation . . . for a kilo[gram]" of cocaine. A kilogram of the drug was later recovered at Presley's residence after his arrest. The trial court granted a directed verdict on charges relating to possession of this material, and twice instructed the jury to disregard all evidence related to those charges.

Even assuming that the kilogram found at Presley's residence was not the specific target of the police's investigation at the Wendy's restaurant, the officer's characterization of the surveillance as attempting to buy a "kilo" was based on his own personal knowledge and was not hearsay.[11] Trial counsel was thus not ineffective when he failed to object to this testimony on the ground of hearsay.[12]

(c) Presley has cited no law suggesting that the trial court's instruction not to open the cocaine was erroneous. Thus he has no basis for his assertion that counsel's failure to object to the instruction amounted to ineffective assistance.[13]

Judgment affirmed. Johnson, P. J., and Mikell, J., concur.

DECIDED FEBRUARY 22, 2008 —
RECONSIDERATION DENIED MARCH 7, 2008 — CERT. APPLIED FOR.

Drug violation. DeKalb Superior Court. Before Judge Hunter.

Gerard B. Kleinrock, for appellant.

Gwendolyn Keyes Fleming, District Attorney, Daniel J. Quinn, Assistant District Attorney, for appellee.

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[10] See *Cooper v. State*, 281 Ga. 760, 762 (4) (a) (642 SE2d 817) (2007) (the scope of cross-examination is grounded in trial tactics and strategy and will rarely constitute ineffective assistance).

[11] See *Castellon v. State*, 240 Ga. App. 85, 86 (1) (522 SE2d 568) (1999) (testimony of investigating officer concerning the officer's personal knowledge of the investigation is not hearsay).

[12] See *Sims v. State*, 281 Ga. 541, 543 (2) (640 SE2d 260) (2007) (failure to raise meritless objection cannot constitute ineffective assistance of counsel).

[13] Id.

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

THE STATE OF GEORGIA,)
)
v.) Case No. 04CR2574-6
)
ERIC PRESLEY,)
Defendant.)

FILED
2007 JUN 26 P 4:00
CLERK OF SUPERIOR COURT
DEKALB COUNTY, GA

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

This Court hereby accepts the parties' joint request to proceed on a stipulated record. After considering the stipulated evidence and argument, the Court finds that the Defendant has failed to show trial error that would warrant granting the motion for new trial and amended motion for new trial.

The Court finds that the evidence does not show that the Court closed the courtroom to the public during voir dire. The Court reasonably instructed Defendant's uncle that he could not sit out in the courtroom next to the prospective jurors during voir dire due to the limited space in the courtroom. See Lonergan v. State, 281 Ga. 637, 640 (4) (2007) ("The trial court is vested with considerable discretion in its conduct of court proceedings."). The Court was also concerned about the possibility of misconduct should there be any interaction between the Defendant's uncle and potential jurors in this case. The Court informed Defendant's uncle that he was welcome to return to the courtroom after the jury had been selected and before opening statements. (T I 3-5) The Court further finds that Defendant can show no harm from the

Court's instructions to his uncle.

The Court finds that it did not err by reasonably instructing the jury not to open the package containing the raw powdered cocaine, which was State's Exhibit 2, during their deliberations in the case. (T II 311) The jury could view the cocaine because it was in a clear plastic bag and they were able to manipulate the cocaine through the bag. However, the jury could not benefit from handling the raw cocaine and such handling could have resulted in State's Exhibit 2 being lost, damaged, or ingested. This instruction was reasonable and not error.

The Court finds that the Defendant has failed to carry his burden of showing ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 687 (1984); Smith v. Francis, 253 Ga. 782, 783 (1985). Defendant's trial counsel, Herbert Shafer, Esq., is a very experienced criminal defense lawyer who has tried hundreds of felony drug cases. In a case where several police officers observed Defendant toss a trafficking amount of cocaine from his car, Mr. Shafer reasonably decided to challenge the credibility of the officers on cross-examination. He cross-examined Shenika Linen, the Crime Lab expert who tested the cocaine, to establish that there may be material other than cocaine in State's Exhibit 2 because it was scraped off a road. Mr. Shafer testified that he did not object to every piece of hearsay and that he did not pursue further questioning regarding the chain of custody and the testing at the Crime Lab because he did not think

it would be helpful to his client. The Court finds that the Defendant has not shown that Mr. Shafer's performance at trial was deficient. See Strickland, supra at 690; Boyd v. State, 275 Ga. 772, 776 (3) (2002).

The Court also finds that, even if Defendant could show that there was deficient performance, he has failed to show any actual prejudice. See Strickland, 466 U.S. at 695; Smith v. Francis, 253 Ga. at 783. There is no prejudice from trial counsel failing to object to the alleged hearsay by Investigator Britt about a "kilo", (T II 166), because the jury heard about a kilogram of cocaine at Defendant's grandmother's house anyway, (T II 170-171), but that cocaine was part of a charge on which a directed verdict of acquittal was granted. The jury was accordingly instructed to disregard the charge involving this kilo of cocaine. (T II 221-222, 290) There was also no prejudice from trial counsel's failure to reserve objections to the jury charge as appellate counsel has not alleged any error with the charge. Finally, there is no prejudice from trial counsel's alleged failure to pursue further questioning of the chain of custody and the testing procedures at the Crime Lab. The evidence of Defendant's guilt was overwhelming in this case and Defendant has not shown that the answers to these questions could have reasonably resulted in a different verdict. See Strickland, supra at 695. See also Rochefort v. State, 279 Ga. 738, 740-741 (2005) (defendant properly convicted of possessing more than 300 ephedrine tablets even though State chemist tested

only 2 of the 2,329 tablets in his possession; chemist testified that all the tablets had the same logo and appearance); Means v. State, 188 Ga. App. 210, 210-211 (2) (1988) (defendant properly convicted of cocaine trafficking (of 41 grams of cocaine) even though State chemist only tested and weighed 20 out of 121 bags of cocaine and extrapolated the weight of the cocaine; all the bags were visually alike and entered into evidence so the fact finder could see and determine the uniformity of the pieces of contraband).

The Court finds further that the evidence was sufficient to support the verdict.

For these reasons, the motion for new trial and amended motion for new trial are DENIED on all grounds.

SO ORDERED, this the 26th day of June, 2007.

LINDA WARREN HUNTER
JUDGE, SUPERIOR COURT
STONE MOUNTAIN JUDICIAL CIRCUIT

Order prepared by Daniel J. Quinn, Assistant District Attorney

Copies to: Daniel J. Quinn, Assistant District Attorney

Gerard Kleinrock, Attorney for Defendant
Office of the Dekalb County Public Defender
408 Callaway Building
120 West Trinity Place
Decatur, Georgia 30030

SUPREME COURT OF GEORGIA

Case No. S08G1152 Atlanta, April 10, 2009

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

ERIC PRESLEY v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Sears, C.J., and Hunstein, P.J., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Therese S. Barnes, Clerk

IN THE SUPERIOR COURT FOR THE COUNTY OF DEKALB

STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
PLAINTIFF,	)	
	)	CASE NUMBER
VS.	)	04-CR-2574-8
	)	
ERIC PRESLEY,	)	
	)	
DEFENDANT.	)	

COPY

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TRANSCRIPT OF THE MOTION FOR NEW TRIAL, BEFORE THE HONORABLE JUDGE LINDA WARREN HUNTER, HELD AT THE DEKALB COUNTY COURTHOUSE, ON THE 4TH DAY OF MAY, 2007.

APPEARANCES OF COUNSEL:

FOR THE STATE: DANIEL QUINN
ASSISTANT DISTRICT ATTORNEY

FOR THE DEFENDANT: GERARD KLEINROCK
ASSISTANT PUBLIC DEFENDER

A. DEANN LANDON, CCR B-2250
DEKALB COUNTY COURTHOUSE
ROOM 405
556 N. MCDONOUGH ST.
DECATUR, GEORGIA 30030
(404)371-2929

I-N-D-E-X T-O E-X-H-I-B-I-T-S

EXHIBIT	ADMITTED
FOR THE DEFENDANT:	
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MAY 4, 2007

THE COURT: MR. PRESLEY. ARE WE READY TO GO FORWARD ON MR. PRESLEY'S CASE?

MR. KLEINROCK: YES, JUDGE.

THE COURT: ALL RIGHT.

MR. KLEINROCK: JUDGE, BEFORE WE BEGIN, I FILED AN AMENDED MOTION FOR NEW TRIAL THAT DID NOT ACTUALLY GET FILED UNTIL YESTERDAY AFTERNOON. IF THE COURT DOESN'T HAVE A COPY, I HAVE A COURTESY COPY.

THE COURT: DID YOU LEAVE A COPY WITH MELISSA?

MR. KLEINROCK: I DID NOT.

THE COURT: TIFFANY, DID YOU BRING A COPY TO MY OFFICE?

MR. KLEINROCK: IT PROBABLY DIDN'T HAVE TIME TO MAKE IT THROUGH THE PROCESS.

THE COURT: IS IT IN THE FILE? IT'S NOT EVEN IN THE CLERK'S FILE YET, BUT I'M SURE IT HAS BEEN STAMPED IN, LOGGED IN. IT'S PROBABLY IN A BASKET WAITING TO BE FILED.

ALL RIGHT. WELL, YOU MAY PROCEED.

MR. KLEINROCK: JUDGE, I'VE SUBPOENAED SEVERAL WITNESSES TO BE HERE TODAY, MOST OF THEM VERY BRIEF. TO JUST GET THEM IN AND OUT OF HERE, I THINK I'LL JUST GO AHEAD AND START CALLING WITNESSES AND RESERVE ANY STATEMENTS FOR THE ARGUMENT.

THE COURT: ALL RIGHT. YOU MAY CALL YOUR FIRST WITNESS. NOW, IF THERE ARE A NUMBER OF WITNESSES, CAN WE CALL MR. SHAFER FIRST TO ACCOMMODATE COUNSEL?

MR. KLEINROCK: I COULD. WELL, LET ME --

THE COURT: YEAH, I WOULD PREFER SINCE HE'S AN OFFICER OF THE COURT AND HE'S BEEN AVAILABLE SO MANY TIMES THAT WE'VE HAD TO RESET THE CASE. HE WAS HERE ONCE BEFORE WHEN WE HAD TO CONTINUE IT AND I'M SURE HE HAS A VERY BUSY TRIAL SCHEDULE. IF WE COULD ACCOMMODATE COUNSEL FIRST AND, IF THERE ARE LAY WITNESSES, CALL THEM AFTER THAT.

MR. KLEINROCK: ONE OF THE WITNESSES IS DEPUTY MARY HOPKINS.

THE COURT: WELL, SHE'LL BE HERE ALL DAY.

MR. KLEINROCK: AND ANOTHER WITNESS IS --

THE COURT: I MEAN, SHE'S NOT GOING TO HAVE SOME FEDERAL JUDGE CALLING ASKING WHERE SHE IS.

MR. SHAFER: I DO HAVE A HEAVY SCHEDULE, YOUR HONOR. I'M A ONE-MAN STORE.

MR. KLEINROCK: WE'LL PROCEED IN THAT FASHION.

THE COURT: THANK YOU, GERARD. NOW, ARE THESE WITNESSES?

MR. KLEINROCK: I THINK THE FAMILY AND THEN MS. LYNN FROM THE CRIME LAB IS PART OF MY PRESENTATION.

THE COURT: ALL RIGHT. ANY RULE OF SEQUESTRATION?

MR. QUINN: I WOULD PREFER THAT, YOUR HONOR, YES, TO

INVOKE THE RULE.

THE COURT: WELL, ANYONE WHO IS GOING TO TESTIFY, WE DO HAVE A WITNESS ROOM OUTSIDE.

MR. KLEINROCK: AND WE'LL PROCEED BY CALLING HERB SHAFER TO THE STAND.

THE COURT: ALL RIGHT. MR. SHAFER.

THE DEPUTY: AVOID NOT PUTTING ANY PAPERS ON THAT SPEAKER.

THE WITNESS: CAN I TOUCH YOU?

THE DEPUTY: YES.

RAISE YOUR RIGHT HAND.

HERBERT SHAFER,

BEING FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE WITNESS: I DO.

THE DEPUTY: STATE YOUR FULL NAME FOR THE COURT, PLEASE.

THE WITNESS: HERBERT SHAFER, S-H-A-F-E-R.

DIRECT EXAMINATION

BY MR. KLEINROCK:

Q MR. SHAFER, DID YOU REPRESENT MR. PRESLEY FOR HIS TRIAL?

A YES, I DID. BUT BEFORE I ANSWER ANY QUESTIONS, I NEED TO ASK THE COURT WHETHER THERE HAS BEEN A WAIVER OF THE CONFIDENTIALITY PRIVILEGE SO THAT I DON'T RUN AFOUL OF THAT AND GET DISBARRED.

MR. QUINN: I HAVE NO MORE QUESTIONS, JUDGE.

THE COURT: MAY MR. SHAFER BE EXCUSED?

MR. KLEINROCK: YES.

THE WITNESS: THANK YOU, YOUR HONOR.

MR. QUINN: YES, YOUR HONOR.

THE COURT: YOU'RE EXCUSED. THANK YOU.

YOU MAY CALL YOUR NEXT WITNESS.

MR. KLEINROCK: WE CALL DEPUTY MARY HOPKINS.

THE COURT: H-O-P-K-I-N-S?

MR. KLEINROCK: H-O-P-K-I-N-S, YES.

THE COURT: THANK YOU.

MR. SHAFER: GOOD LUCK.

GOOD LUCK, MR. PRESLEY. GOOD LUCK.

THE DEPUTY: HAVE A SEAT.

MARY HOPKINS,

BEING FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE WITNESS: I DO.

THE DEPUTY: STATE YOUR FULL NAME FOR THE COURT, PLEASE.

THE WITNESS: DEPUTY M. HOPKINS.

THE COURT: IS THAT MARY, FOR THE RECORD?

THE WITNESS: MARY HOPKINS.

DIRECT EXAMINATION

BY MR. KLEINROCK:

Q DEPUTY HOPKINS, COULD YOU TELL US HOW LONG HAVE YOU

BEEN A DEPUTY WITH THE DEKALB COUNTY SHERIFF'S OFFICE.

A I'VE BEEN A DEPUTY EIGHT YEARS.

Q OKAY. HOW LONG OF THAT TIME HAVE YOU BEEN ASSIGNED TO COURTROOM SECURITY?

A SEVEN.

Q AND SPECIFICALLY TALKING ABOUT THE COURTROOM THAT WE'RE IN NOW OR COURTHOUSE THAT WE'RE IN NOW, HOW LONG OF THAT TIME HAVE YOU WORKED IN THIS NEW BUILDING, THIS NEW COURTHOUSE?

A EVER SINCE IT OPENED UP.

Q DO YOU RECALL WHEN IT OPENED UP?

A I DON'T KNOW IF -- I'M NOT FOR SURE.

Q OKAY. HAS IT BEEN YEARS? MONTHS?

A IT'S BEEN AT LEAST TWO TO THREE YEARS.

Q OKAY. AND OF THAT TWO TO THREE YEARS, HAVE YOU BEEN -- WHAT HAVE BEEN YOUR DUTIES DURING THAT TIME?

A I'M PRESENTLY ASSIGNED AS BAILIFF FOR JUDGE WORKMAN.

Q OKAY. NOW, PART OF YOUR DUTIES INVOLVE -- OR DO YOUR DUTIES INVOLVE PROVIDING SECURITY DURING ARRAIGNMENTS?

A YES.

Q AND DURING ARRAIGNMENTS, ARE YOU RESPONSIBLE FOR SECURITY OF INMATES?

A YES.

Q CAN YOU TELL US HOW MANY INMATES DO YOU GENERALLY PUT ON -- WELL, FIRST LET ME -- THE COURTROOM THAT WE'RE IN, JUDGE HUNTER'S COURTROOM, HOW MANY ROWS OF BENCHES ARE THERE?

A EIGHT, FOUR ON EACH SIDE.

Q OKAY. EIGHT BENCHES TOTAL, FOUR ON EACH SIDE? HOW MANY INMATES DO YOU GENERALLY PUT ON EACH BENCH?

A IT'S NOT SHERIFF'S DEPARTMENT POLICY, BUT IT'S DEPENDING ON THE BENCH AND THE SIZE OF THE INMATE; APPROXIMATELY SEVEN.

Q SO IT MAY VARY, BUT ARE YOU SAYING THE ROUTINE IS TO PUT SEVEN PER BENCH?

A YES.

Q WHEN YOU PUT INMATES ON A BENCH, ARE THEY SEGREGATED BY GENDER?

A YES.

Q SO IT WOULD BE ALL MALES ON ONE BENCH? AM I UNDERSTANDING THAT CORRECTLY?

A CORRECT.

Q AND IF YOU PUT SEVEN, IT WOULD BE SEVEN MEN ON ONE BENCH?

A YES.

Q OKAY. AND JUST GETTING MORE TO THE LAYOUT OF THE COURTROOM, IS IT TRUE THAT BETWEEN THE TWO -- I THINK YOU SAID THERE IS FOUR BENCHES ON EACH SIDE OF THE COURTROOM. BETWEEN TWO SIDES, IS IT FAIR TO SAY THERE IS A LARGE AREA OR HALLWAY?

A YES.

Q ABOUT HOW WIDE WOULD YOU SAY THAT IS?

A IT'S APPROXIMATELY 12 FEET.

Q OKAY. IN SOME OF THE -- AS PART OF YOUR DUTIES, DO YOU GET ASSIGNED TO VARIOUS COURTROOMS AROUND THE COURTHOUSE?

A YES.

THE COURT: AS BAILIFF OR SECURITY?

THE WITNESS: BOTH.

THE COURT: YOU'VE NEVER BEEN ASSIGNED TO ME AS A BAILIFF.

THE WITNESS: NO; BUT I HAVE FOR JUDGE CASTELLANI.

THE COURT: RIGHT. I MEAN, YOU'VE NEVER BEEN ASSIGNED TO ME AS BAILIFF TO KNOW WHAT MY PREFERENCE IS AS TO HOW TO SEAT THE JURORS AND THINGS LIKE THAT?

THE WITNESS: NO.

BY MR. KLEINROCK:

Q IN SOME OF THE COURTROOMS, IS ADDITIONAL SEATING PROVIDED OUT IN THE AUDIENCE BUT BEYOND THE BENCHES?

A YES.

Q CAN YOU TELL US ABOUT THAT.

A JUDGE COURSEY HAS SEATS ON THE SHORTER BENCHES. HE'LL HAVE A CHAIR ON THE THREE SHORTER BENCHES ON EACH SIDE.

THE COURT: FOR INMATES?

THE WITNESS: I DON'T KNOW IF INMATES HAVE ACTUALLY SAT THERE. I KNOW THE PUBLIC HAS.

THE COURT: ARE THESE DETACHABLE CHAIRS?

THE WITNESS: NO.

THE COURT: THEY'RE BOLTED TO THE FLOOR?

THE WITNESS: NO. YOU CAN MOVE THEM, YES.

THE COURT: CAN THEY BE USED AS A WEAPON?

THE WITNESS: YES.

THE COURT: IF SOMEONE BECAME IRATE?

THE WITNESS: YES.

THE COURT: ARE THEY METAL CHAIRS OR WOOD CHAIRS?

THE WITNESS: WOOD CHAIRS.

THE COURT: IS THAT APPROVED BY THE SHERIFF'S DEPARTMENT?

THE WITNESS: I COULDN'T SAY.

THE COURT: BUT DO YOU MIND, I'VE JUST -- I'VE NEVER HEARD OF THAT. FOR INSTANCE, I'VE HAD TO REMOVE MY PITCHERS FROM THE TABLES WHICH ARE JUST METAL PITCHERS BECAUSE ONE OF MY PUBLIC DEFENDERS WAS ATTACKED BY ONE OF HER CLIENTS, AND IMMEDIATELY BEFORE HE STRUCK HER WITH HIS FIST, ONE OF THE BAILIFFS SAW HIM LOOKING AT THE METAL PITCHER AND THAT WAS MY BAILIFF AT THE TIME WHO WAS UNDER THE IMPRESSION THAT HE WAS ABOUT TO GO FOR THE METAL PITCHER. BUT WHEN HE SAW THE BAILIFF LOOKING AT HIM, HE JUST JUMPED ON HER AND STARTED HITTING HER, SO AS A RESULT, MY BAILIFF SUGGESTED THAT ANYTHING ON THE TABLE CAN BE USED AS A WEAPON SHOULD BE REMOVED. SOMETIMES FAMILY MEMBERS BECOME IRATE IN THE AUDIENCE, TOO.

I'VE ACTUALLY HAD A DEFENDANT IN THE OLD COURTHOUSE TRY TO THROW THE ATTORNEY'S BENCH AT ME. BUT YOU SAID

YOU'RE IN CHARGE OF SECURITY. DO YOU THINK THAT'S A GOOD -- YOU KNOW, NOT TO CRITICIZE JUDGE CASTELLANI PERSONALLY, BUT DO YOU THINK THAT'S A GOOD SECURITY POLICY?

THE WITNESS: WELL, IT'S JUDGE COURSEY.

THE COURT: I'M SORRY, JUDGE COURSEY. NOT TO CRITICIZE JUDGE COURSEY, BECAUSE HE'S MY FAVORITE JUDGE OF ALL TIME, EVEN WHEN I WAS IN THE D.A.'S OFFICE, LET'S PUT THAT ON THE RECORD, AND I LOVE HIM TO DEATH, BUT DO YOU APPROVE OF THAT FROM THE ASPECT OF SECURITY?

THE WITNESS: I DON'T THINK IT'S THAT I SHOULD HAVE AN OPINION. I MEAN, I THINK THAT'S BETWEEN THE HIGHER-UPS.

THE COURT: ALL RIGHT. SO YOU JUST ENFORCE WHATEVER SECURITY THAT'S IN PLACE?

THE WITNESS: CORRECT.

THE COURT: YOU DON'T COMMENT ON POLICY? ARE THESE METAL CHAIRS OR WOOD?

THE WITNESS: THEY'RE WOOD.

THE COURT: OKAY. I KNOW SOME OF THE JUDGES EVEN REMOVED THE EAGLES FROM THE FLAGPOLES THAT ARE METAL, WHICH I HAVEN'T DONE BECAUSE -- BUT I HAVE MOVED IT FROM -- WE HAD IT OVER THERE GOING TO THE DETENTION AREA, BECAUSE IT WAS FELT THAT THAT COULD POSSIBLY BE USED AS A WEAPON. BUT YOU JUST WHATEVER THE SHERIFF HAS IN PLACE,

YOU JUST ENFORCE IT? YOU DON'T COMMENT ON INDIVIDUAL COURTROOM POLICY?

THE WITNESS: CORRECT.

THE COURT: IS JUDGE COURSEY THE ONLY JUDGE WHO DOES THAT? DO YOU KNOW WHY HE DOES IT? I MEAN, IS THERE ADEQUATE SEATING WITHOUT PUTTING CHAIRS IN THERE?

THE WITNESS: I DON'T KNOW WHY. I MEAN, I DON'T THINK IT'S MY POINT TO ASK HIM WHY HE'S GOT CHAIRS.

THE COURT: ARE THEY PERMANENT IN HIS COURTROOM?

THE WITNESS: YES.

THE COURT: HE USES IT ALL THE TIME OR JUST IF HE HAS AN OVERFLOW CROWD?

THE WITNESS: NO. THEY'RE PERMANENT.

THE COURT: AND DID YOU SAY INMATES SIT IN THEM OR JUST THE PUBLIC?

THE WITNESS: I DON'T REMEMBER WHETHER INMATES HAVE SAT IN THEM BEFORE.

THE COURT: OKAY. THANK YOU. THAT'S VERY INTERESTING.

BY MR. KLEINROCK:

Q LET ME JUST ASK ALONG THE LINES OF ME -- GENERALLY, WHEN YOU ARE PROVIDING SECURITY DURING AN ARRAIGNMENT, DO YOU SEGREGATE THE SIDES OF THE COURTROOM; MEANING INMATES ON ONE SIDE, THE PUBLIC ON THE OTHER?

A YES; UNLESS THERE IS AN OVERFLOW OF INMATES.

Q OKAY. ARE THE CHAIRS IN JUDGE COURSEY'S COURTROOM ON THE INMATES' SIDE IN ADDITION TO THE PUBLIC SIDE?

A YES.

Q DOES JUDGE SEELIGER HAVE A SIMILAR SETUP WITH ADDITIONAL CHAIRS OR DO YOU KNOW?

A I DON'T REMEMBER. I JUST REMEMBERED JUDGE COURSEY DOES HAVE THEM IN HIS COURTROOM.

THE COURT: DOES HE STILL HAVE THEM THERE?

THE WITNESS: YES.

THE COURT: EVEN THIS HAS BEEN POST THE INCIDENT IN FULTON COUNTY?

THE WITNESS: YES.

BY MR. KLEINROCK:

Q LET ME JUST -- WE'VE TALKED ABOUT THE ROWS OF BENCHES IN THE COURTROOM. THE FOURTH ROW, IS IT FAIR TO SAY THAT THE FOURTH ROW COULD BE SPACE FOR AN EXTRA PERSON TO SIT COMFORTABLY BEYOND THE FIRST THREE ROWS?

A YES.

Q SO IF YOU COULD FIT SEVEN COMFORTABLY ON THE FIRST THREE ROWS, YOU COULD FIT EIGHT COMFORTABLY ON THE LAST ROW?

A CORRECT.

Q LET ME JUST ASK YOU, DURING A JURY TRIAL, HAVE YOU BEEN -- HAS IT BEEN PART OF YOUR DUTY TO PROVIDE SECURITY DURING A JURY TRIAL?

A YES.

Q GENERALLY, DURING A JURY TRIAL, HOW MANY DEPUTIES ARE PRESENT IN THE COURTROOM?

A IT'S DEPENDING ON WHETHER THE PERSON IS IN CUSTODY OR NOT AND THEIR CHARGES.

Q OKAY. IF A PERSON IS ON BOND, GENERALLY, HOW MANY DEPUTIES WOULD THERE BE?

A THERE IS USUALLY ONLY ONE.

Q OKAY. AND IF A PERSON IS IN CUSTODY, GENERALLY, HOW MANY DEPUTIES WOULD THERE BE?

A TWO.

Q IN A CASE WHERE YOU HAVE AN EXTRA DEPUTY BECAUSE SOMEONE IS IN CUSTODY, WHERE IS THAT DEPUTY USUALLY STATIONED IN THE COURTROOM, IF THERE IS A USUAL PLACE?

A USUALLY IN THE BACK OF THE ROOM.

Q OKAY. AND YOU'RE TALKING ABOUT NEXT TO THE EXIT DOORS?

A CORRECT.

Q LET ME JUST APPROACH WITH WHAT I MARKED AS DEFENDANT'S EXHIBITS 1, 2 AND 3.

THE COURT: DO YOU HAVE A COPY?

MR. QUINN: I HAVE NO PROBLEM; NO OBJECTION, YOUR HONOR.

THE COURT: MAY I SEE THEM?

BY MR. KLEINROCK:

Q HAVE YOU HAD A CHANCE TO REVIEW THOSE PHOTOGRAPHS --

OR THOSE EXHIBITS? I'M SORRY.

A YES.

Q DO THEY FAIRLY AND ACCURATELY DEPICT THE PUBLIC SEATING AREA IN THIS COURTROOM?

A YES.

Q OKAY. LET ME ASK YOU, I THINK IT'S DEFENDANT'S EXHIBIT 2, DOES THAT SHOW THE EXIT DOOR?

A YES.

Q OKAY. AND I KIND OF GOT OUT OF ORDER AND HAD TO GET BACK TO THIS. DOES THAT SHOW THE AREA WHERE THE SECOND DEPUTY IS TRADITIONALLY STATIONED DURING A CUSTODIAL JURY TRIAL?

A YES.

Q WOULD THAT BE NEXT TO THOSE DOUBLE DOORS?

A CORRECT.

Q OKAY.

MR. KLEINROCK: ALL RIGHT. THANK YOU.

THE COURT: ARE YOU MOVING TO ADMIT D-1, 2 AND 3?

MR. KLEINROCK: YEAH, I'M SORRY. I'LL MOVE TO ADMIT.

THE COURT: ANY OBJECTION?

MR. QUINN: NO OBJECTION.

THE COURT: THEY'RE ADMITTED.

CROSS-EXAMINATION.

MR. QUINN: YES, YOUR HONOR.

CROSS-EXAMINATION

BY MR. QUINN:

Q WERE YOU IN THE COURTROOM DURING THE START -- OR AT THE START OF THIS DEFENDANT'S TRIAL?

A NO.

Q YOU HAVE NO PERSONAL KNOWLEDGE OF HOW FULL THE COURTROOM WAS AT THAT TIME?

A NO.

Q YOU'VE BEEN IN COURTROOMS WHEN JURORS ARE BROUGHT UP FOR VOIR DIRE; CORRECT?

A YES.

Q THE COURTROOM GETS VERY CROWDED AT THAT TIME; CORRECT?

A YES.

Q IS IT HARDER TO MAINTAIN SECURITY IN A CROWDED COURTROOM?

A YES.

MR. QUINN: NO MORE QUESTIONS, JUDGE.

REDIRECT EXAMINATION

BY MR. KLEINROCK:

Q JUST RELATING TO THAT, IF IT'S HARDER TO MAINTAIN SECURITY IN A CROWDED COURTROOM, SUCH AS DURING VOIR DIRE WHEN THERE ARE NUMEROUS JURORS PRESENT, DOES THE SHERIFF'S OFFICE TYPICALLY SEND ADDITIONAL DEPUTIES TO THE COURTROOM DURING THAT PERIOD?

A IF THEY'RE REQUESTED.

Q IN YOUR EXPERIENCE AS AN OFFICER PROVIDING SECURITY

IN THE COURTROOMS FOR THE LAST SEVEN YEARS, HAVE YOU SEEN OCCASIONS WHERE THAT'S HAPPENED WHERE EXTRA SECURITY HAS BEEN REQUESTED JUST DURING VOIR DIRE?

A I HAVE; NOT TYPICALLY.

MR. KLEINROCK: ALL RIGHT. THANK YOU.

THE COURT: ANYTHING FURTHER?

MR. QUINN: NO MORE QUESTIONS, YOUR HONOR.

THE COURT: YOU CAN STEP DOWN.

CAN SHE BE EXCUSED OR IS SHE STATIONED TO OUR COURTROOM TODAY?

MR. KLEINROCK: YES, THAT'S FINE.

THE COURT: FOR THE RECORD, WE ONLY HAVE ONE BAILIFF WHEN THE DEFENDANT IS IN CUSTODY.

BUT YOU CAN BE EXCUSED.

WELL, I HAVE MY REGULAR BAILIFF, BUT SHE'S NOT NECESSARILY COURT SECURITY.

YOU MAY CALL YOUR NEXT WITNESS.

MR. KLEINROCK: I CALL CAROL ELLIS.

THE COURT: I THINK SHE'S OUT IN THE WITNESS ROOM. I WAS GOING TO ASK YOU DID YOU WANT TO CHECK AND MAKE SURE SHE WAS STILL OUT THERE BUT THE BAILIFF HAS HER.

THE DEPUTY: AVOID TOUCHING THE MICROPHONE. RAISE YOUR RIGHT HAND.

CAROL ELLIS,

BEING FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE WITNESS: I DO.

THE DEPUTY: STATE YOUR FULL NAME FOR THE COURT, PLEASE.

THE WITNESS: MY NAME IS CAROL ELLIS.

DIRECT EXAMINATION

BY MR. KLEINROCK:

Q MS. ELLIS, HOW ARE YOU EMPLOYED?

A I'M EMPLOYED AS AN INVESTIGATOR.

Q HOW LONG HAVE YOU BEEN --

THE COURT: WITH THE PUBLIC DEFENDER'S OFFICE?

THE WITNESS: WITH THE PUBLIC DEFENDER OFFICE IN DEKALB COUNTY.

BY MR. KLEINROCK:

Q THERE IS NO JURY HERE. YOU CAN SAY.

A OKAY.

Q HOW LONG HAVE YOU BEEN EMPLOYED AS AN INVESTIGATOR?

A I HAVE BEEN AN INVESTIGATOR FOR APPROXIMATELY 18 YEARS.

Q OKAY. AND THAT'S WITH WHAT OFFICES?

A WITHIN THE COUNTY, WITH THE PUBLIC DEFENDER OFFICE AND THE DISTRICT ATTORNEY'S OFFICE.

Q OKAY. LET ME SHOW YOU WHAT I'VE MARKED --

MR. KLEINROCK: JUDGE, I HAVE TWO ADDITIONAL PHOTOGRAPHS. THEY'RE JUST SAMPLES OF --

THE COURT: ALL RIGHT.

BY MR. KLEINROCK:

Q LET ME SHOW YOU WHAT I'VE MARKED AS, I'LL SHOW YOU ALL OF THEM, DEFENDANT'S EXHIBITS 1 THROUGH 5 AND ASK YOU TO TAKE A LOOK AT THOSE.

THE COURT: YOU ALREADY HAVE 1, 2 AND 3.

MR. KLEINROCK: RIGHT, I UNDERSTAND.

THE COURT: YOU ALREADY HAD EXHIBITS 1, 2 AND 3, SO THESE ARE 1 THROUGH 5?

MR. KLEINROCK: YES. I'M JUST SHOWING HER THE SAME EXHIBITS.

THE COURT: SO YOU HAVE TWO NEW EXHIBITS, 4 AND 5?

MR. KLEINROCK: RIGHT. AND THIS WILL BE --

THE COURT: ALL RIGHT. THIS IS 1, 2, 3, 4 AND 5.

BY MR. KLEINROCK:

Q DO THOSE EXHIBITS 1 THROUGH 5, DO THOSE ALL FAIRLY AND ACCURATELY DEPICT THE SCENES THAT ARE IN THEM?

A YES, THEY DO.

Q WERE YOU PRESENT WHEN THOSE PHOTOGRAPHS WERE TAKEN?

A YES, I WAS.

Q DID YOU TAKE ANY OF THOSE PHOTOGRAPHS?

A I DID.

Q DO YOU RECALL WHICH ONES YOU TOOK?

A I TOOK EXHIBIT NO. 4 AND EXHIBIT NO. 5.

Q OKAY.

MR. KLEINROCK: JUDGE, AT THIS POINT I WOULD MOVE TO

TENDER 4 AND 5.

THE COURT: ANY OBJECTION?

MR. QUINN: NO OBJECTION, YOUR HONOR.

THE COURT: THEY'RE ADMITTED.

MR. KLEINROCK: THAT'S ALL.

THE COURT: ANY QUESTIONS?

MR. QUINN: JUST A COUPLE, YOUR HONOR.

CROSS-EXAMINATION

BY MR. QUINN:

Q INVESTIGATOR, YOU WEREN'T HERE DURING ANY PART OF ERIC PRESLEY'S TRIAL?

A NO, THAT'S CORRECT, I WAS NOT.

MR. QUINN: THAT'S ALL, YOUR HONOR.

THE COURT: MAY SHE BE EXCUSED?

MR. KLEINROCK: YES, JUDGE.

THE COURT: THANK YOU. YOU'RE EXCUSED. YOU MAY CALL YOUR NEXT WITNESS.

MR. KLEINROCK: OUR LAST WITNESS WILL BE SHENIKA LINEN.

THE COURT: IS THAT L-I-N-E-N?

MR. KLEINROCK: YES, JUDGE.

THE COURT: WE'LL GET HER TO SPELL IT.

THE DEPUTY: JUST HAVE A SEAT RIGHT HERE. HAVE A SEAT, PLEASE. RAISE YOUR RIGHT HAND.

///

MR. KLEINROCK: NO FURTHER WITNESSES, JUDGE.

THE COURT: ANYTHING FROM THE STATE?

MR. QUINN: NO WITNESSES, YOUR HONOR.

THE COURT: LET'S HEAR ARGUMENT.

MR. KLEINROCK: JUDGE, JUST GOING DOWN IN ORDER OF MY AMENDED MOTION FOR NEW TRIAL, THE FIRST ISSUE IS THE EXCLUSION OF MR. PRESLEY'S FAMILY FROM THE COURTROOM. AND I KNOW I WENT THROUGH A LOT OF RIGAMAROLE TODAY TRYING TO DEMONSTRATE --

THE COURT: COULD YOU SPECIFY FOR WHAT PORTION OF THE TRIAL? WAS IT JUST DURING THE VOIR DIRE?

MR. KLEINROCK: ACCORDING TO THE TRANSCRIPT, IT WAS FOR VOIR DIRE AND THE COURT SAID THAT HE COULD RETURN FOR OPENING STATEMENTS AND DURING THE REST OF THE TRIAL. YES, THE TRANSCRIPT IS VERY CLEAR ON THAT.

THE COURT: ALL RIGHT.

MR. KLEINROCK: JUDGE, AND THAT'S WHY, REALLY, MY FOCUS WAS ON THE VOIR DIRE, ALSO. JUDGE, I THINK THE EVIDENCE WOULD BE THAT YOU COULD FIT 42 JURORS IN THIS COURTROOM OR AT LEAST MAKE AN ACCOMMODATION TO FIT 42 JURORS IN THIS COURTROOM USING JUST ONE SIDE OF THE COURTROOM AND THE JURY BOX.

THE COURT: HAVE YOU EVER TRIED A CASE IN MY COURTROOM?

MR. KLEINROCK: I HAVE, JUDGE.

THE COURT: I DON'T RECALL THAT YOU HAVE. I KNOW YOU WERE ASSIGNED TO MY COURTROOM. BUT I THOUGHT IT WAS INTERESTING THAT YOU DIDN'T CALL ANY BAILIFF WHO HAD EVER BEEN ASSIGNED TO MY COURTROOM, INCLUDING MY CURRENT BAILIFF, TO STATE WHY WE SEAT THE JURORS THE WAY WE SEAT THEM. BUT IN MY COURTROOM AND THE RECORD -- YOU KNOW, IT'S NOT ON THE RECORD AND I'M NOT OFFERING TESTIMONY, BUT THERE ARE JURORS ON EVERY ROW HERE IN THE AUDIENCE. AND JUDGE COURSEY AND JUDGE SEELIGER, THEY MAY HAVE DIFFERENT POLICIES, BUT I DON'T PERMIT FAMILY MEMBERS OR WITNESSES FOR THE STATE OR EITHER SIDE TO INTERMINGLE OR SIT ON THE ROWS WITH THE JURORS. AND YOU'RE RIGHT, I DON'T THINK I CAN COMFORTABLY -- SURE, I COULD CRAM AS MANY JURORS ON ONE OF THOSE ROWS AS POSSIBLE, BUT BECAUSE VOIR DIRE OFTEN LASTS FOR A DAY OR LONGER, SOMETIMES TWO OR THREE DAYS, THAT IS NOT COMFORTABLE. I GUESS IT'S A MATTER OF PERSPECTIVE, BUT WHEN YOU'RE SITTING IN THOSE CHAIRS AND YOU'RE ELBOW TO ELBOW TO ANOTHER JUROR WHO IS SWEATING, TALKING, YOU KNOW, AIR CONDITIONING, THE HEAT IN THE COURTROOM, I DON'T CONSIDER THAT COMFORTABLE. THEORETICALLY, YOU COULD PUT PINHEADS THERE AND PUT AS MANY JURORS AS YOU WANT. BUT, YOU KNOW, IT'S UP TO THE INDIVIDUAL JUDGE TO DECIDE, YOU KNOW, WHAT'S COMFORTABLE AND WHAT'S NOT COMFORTABLE AND SECURITY.

AND, YOU KNOW, I THINK I STATE MY REASONS ON THE

RECORD. I DON'T KNOW IF I DID IN THIS CASE ABOUT WHY I DON'T THINK IT'S A GOOD POLICY AND I DON'T THINK JURORS SHOULD BE INTERMINGLED WITH FAMILY MEMBERS OR WITNESSES SHOULD SIT CLOSE ENOUGH TO THEM THAT THEY CAN OVERHEAR THEIR COMMENTS. WHEN THE JURY GOES ON BREAKS, THE FAMILY MEMBERS GO ON BREAKS WITH THEM, GO INTO THE SAME BATHROOMS WITH THEM TALKING ABOUT THE CASE.

BUT YOU ARE CORRECT. LITERALLY, WE PROBABLY COULD PUT AS MANY PEOPLE ON EACH OF THOSE ROWS AS WE COULD CRAM THERE. WHETHER OR NOT THAT'S COMFORTABLE FOR TWO OR THREE HOURS OF VOIR DIRE, A DAY OF VOIR DIRE, TWO OR THREE DAYS OF VOIR DIRE, I THINK IT'S LEFT TO THE SOUND DISCRETION OF THE TRIAL JUDGE AS TO HOW MANY PEOPLE I PUT ON A ROW.

DO YOU HAVE CASE LAW TO THE CONTRARY? AND I KNOW YOU'RE TRYING TO MAKE YOUR CASE. IT'S MY UNDERSTANDING OF THE LAW THAT THE DEFENDANT HAS A CONSTITUTIONAL RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF THE PROCEEDINGS; YOU KNOW, NOT NECESSARILY THE PUBLIC WHEN IT OUTWEIGHS OTHER SECURITY MATTERS. AND THERE IS NOTHING ON THE RECORD TO SAY HOW MANY BATTERIES WE HAD THAT DAY. I THINK MR. BRESLEY, I'M NOT SURE IF HE WAS IN BOND OR OFF BOND.

MR. KLEINROCK: HE WAS ON BOND, I PRESUME.

THE COURT: WERE YOU IN JAIL, MR. BRESLEY?

THE DEFENDANT: NO, MA'AM.

THE COURT: YOU WERE ON BOND?

THE DEFENDANT: I WAS NEVER ON BOND FOR THIS CASE.

THE COURT: YOU WERE IN JAIL?

MR. KLEINROCK: I'M SORRY. IT WAS DISMISSED AT THE PRELIMINARY HEARING BUT HE WAS NOT IN CUSTODY.

THE COURT: WERE YOU IN JAIL DURING YOUR TRIAL?

THE DEFENDANT: NO.

THE COURT: OKAY. SO YOU WERE ON BOND DURING THE TRIAL? I MEAN, YOU GOT TO GO HOME EVERY DAY AT THE END OF THE DAY?

THE DEFENDANT: YES.

THE COURT: OKAY. SO THAT'S WHAT BOND MEANS.

MR. KLEINROCK: TECHNICALLY, HE WASN'T ON BOND. I THINK IT WAS DISMISSED, BUT HE WAS NOT IN CUSTODY.

THE COURT: ALL RIGHT.

MR. KLEINROCK: JUDGE --

THE COURT: AND I THINK YOUR WITNESS TESTIFIED THAT, GENERALLY, IF SOMEONE IS ON BOND, THERE IS ONLY ONE BAILIFF IN THE COURTROOM.

MR. KLEINROCK: CORRECT. BUT, YOU KNOW, IF IT REQUIRES PROTECTING THE RIGHT TO A PUBLIC TRIAL, YOU CAN REQUEST ANOTHER BAILIFF.

THE COURT: HE GOT A PUBLIC TRIAL.

MR. KLEINROCK: WELL, THAT'S WHAT WE'RE ARGUING ABOUT, JUDGE.

THE COURT: ALL RIGHT.

MR. KLEINROCK: I SUBMIT THAT YOU COULD PUT -- EVEN IF YOU PUT SIX PEOPLE ON EACH OF THE SMALLER BENCHES AND SEVEN ON THE LAST BENCH, IF YOU JUST ADDED THREE CHAIRS, YOU CAN FIT SEVEN ON EACH OF THOSE ROWS, SEVEN ON --

THE COURT: WELL, WE HAD 42 JURORS BROUGHT UP AND I GENERALLY PUT 14 IN THE BOX. FOR CRIMINAL CASES I BRING WAY MORE THAN I BRING FOR CIVIL CASES AND I THINK WE HAD -- YOU KNOW, WE HAD SOME ON EACH SIDE OF THE AUDIENCE. OF COURSE, UNFORTUNATELY, THE RECORD DOESN'T REFLECT HOW THE JURORS WERE SEATED IN THIS CASE.

MR. KLEINROCK: IT MAY NOT DO IT PERFECTLY, BUT IT SORT OF DOES. YOU SAY 14 IN THE BOX AND SIX ON EACH ROW. THAT'S IN THE TRANSCRIPT.

THE COURT: WELL --

MR. KLEINROCK: OR SIX ON EACH BENCH, I GUESS.

JUDGE, MY CONTENTION IS IF YOU HAD -- YOU WOULD ESSENTIALLY HAVE SIX ROWS OF SEVEN IF YOU USE ONE SIDE OF THE COURTROOM AND THE JURY BOX.

THE COURT: BUT ISN'T IT ULTIMATELY THE JUDGE'S DISCRETION AND NOT YOURS HOW I SEAT JURORS IN MY COURTROOM?

MR. KLEINROCK: CERTAINLY.

THE COURT: AND IF I HAD SECURITY ISSUES, WE HAD ONE BAILIFF? I MEAN, I GUESS THERE IS NOTHING IN THE RECORD STATING HOW MANY BAILIFFS WE HAD THAT DAY, BUT --

MR. KLEINROCK: PRESUMABLY, IT WAS ONLY ONE.

THE COURT: -- YOUR WITNESS SAID THERE IS ONLY ONE BAILIFF WHEN THE DEFENDANT IS ON BOND, SO WE HAD 42 JURORS, HE'S STILL A DEFENDANT CHARGED WITH A CRIMINAL OFFENSE, EVEN IF HE IS ON BOND, AND, GENERALLY, THE BAILIFF'S ROLE IS ALSO TO MAKE SURE THAT THAT DEFENDANT, EVEN IF HE IS ON BOND, THAT SECURITY IS BEING OBSERVED AND TO PAY ATTENTION TO THE DEFENDANT. AND WE HAVE A STRIKE CLERK BUT SHE'S NOT MAKING SURE THAT WITNESSES AREN'T INTERMINGLING WITH JURORS. BUT WITH ONE BAILIFF IN THE COURTROOM, YOU KNOW -- AND, ULTIMATELY, IT'S THE TRIAL JUDGE'S DISCRETION HOW TO SEAT JURORS IN THE COURTROOM AND THIS IS A VERY SMALL COURTROOM. I THINK YOUR PICTURES SHOW IT'S A VERY SMALL COURTROOM.

MR. KLEINROCK: JUDGE --

THE COURT: AND WHEN YOU BECOME A JUDGE, YOU MIGHT PUT, YOU KNOW, TEN PEOPLE ON EACH BENCH OR 12 PEOPLE ON EACH BENCH AND LET THEM SIT THERE FOR TWO DAYS. THAT'S TOTALLY UP TO YOU. BUT I THINK, ULTIMATELY, IT'S WITHIN MY SOLE DISCRETION TO DECIDE WHETHER IT'S COMFORTABLE TO HAVE SIX PEOPLE ON EACH ROW SO THEY CAN SPREAD OUT, THEY'RE NOT CRAMPED UP DURING A LENGTHY VOIR DIRE PROCESS. IT'S TOTALLY UP TO MY DISCRETION WHETHER OR NOT I WANT FAMILY MEMBERS IN THE COURTROOM TO INTERMINGLE WITH THE JURORS AND SIT DIRECTLY BEHIND THE JURORS WHERE THEY MIGHT

OVERHEAR SOME INADVERTENT COMMENT OR CONVERSATION. ISN'T THAT WHAT THE CASE LAW SAYS, THAT IT'S MY DISCRETION?

MR. KLEINROCK: I THINK GENERALLY IT'S YOUR DISCRETION AS TO -- IN THE ABSTRACT IT'S YOUR DISCRETION AS TO SUCH MATTERS. WHEN IT COMES TO EXCLUDING MEMBERS OF THE PUBLIC FROM TRIAL, I THINK THE COURT IS REQUIRED TO MAKE EVERY POSSIBLE ACCOMMODATION.

THE COURT: BUT THE PUBLIC WAS NOT EXCLUDED FROM THE TRIAL.

MR. KLEINROCK: WELL, WE CONTEND THEY WERE, THAT MR. PRESLEY'S FAMILY WAS THE ONLY PUBLIC THAT WANTED TO SEE THE TRIAL AND THEY WERE NOT ALLOWED TO.

THE COURT: WELL, THEY SAW THE TRIAL, BUT I EXERCISED MY DISCRETION AND DID NOT PERMIT THEM TO INTERMINGLE WITH THE JURORS AND SIT ON THE BENCHES WITH THE JURORS. AND I USED MY DISCRETION TO DECIDE HOW MANY JURORS I WANTED TO COMFORTABLY SEAT IN THE COURTROOM.

MR. KLEINROCK: ONE OTHER POINT, JUST TO ADDRESS ONE OF THE COURT'S CONCERNS THAT YOU HAD EXPRESSED, I HAD PRESUMED, AS I THINK DOES THE COURT, THAT THERE WAS ONLY ONE DEPUTY PRESENT. I THINK THAT'S -- THE EVIDENCE WAS THAT IS THE STANDARD PRACTICE.

THE COURT: THAT'S WHAT YOUR WITNESS TESTIFIED TO. THIS CASE WAS TRIED IN SEPTEMBER, SEPTEMBER THE 29TH, 2005. I HAVE ABSOLUTELY NO INDEPENDENT RECOLLECTION OF

HOW MANY BAILIFFS WERE IN THE COURTROOM THAT DAY OR DURING THE TRIAL.

MR. KLEINROCK: BUT MY POINT IS THE COURT CAN REQUEST ADDITIONAL SECURITY AND THAT CAN BE PROVIDED.

THE COURT: WELL, YOU KNOW, WE'VE DONE THAT. IT'S JUST LIKE THE PUBLIC DEFENDER CAN REQUEST TO BE PERMITTED TO GO TO THE JAIL AND BE ABLE TO ROAM ALL OVER THE JAIL TO SEE YOUR CLIENTS BUT THE SHERIFF HAS DENIED IT. THE SHERIFF HAS MADE IT VERY CLEAR THAT HE DECIDES SECURITY. HE DECIDES HOW MANY BAILIFFS ARE SENT TO THE COURTROOM. THERE CAN BE TEN JUDGES HAVING AN ARRAIGNMENT CALENDAR THAT DAY. THAT'S HIS CONSTITUTIONAL RIGHT. I HAVE NEVER QUESTIONED THE SHERIFF'S DISCRETION. AND I HAVE REQUESTED, THOUGH, WHEN A VERDICT IS READ THAT WE HAVE ADDITIONAL SECURITY IN A CRIMINAL CASE, AND I THINK AS A MATTER OF POLICY, THE SHERIFF ACCOMMODATES THAT. BUT, YOU KNOW, DEPUTY HOPKINS HAS A DIFFERENT UNDERSTANDING OF WHAT WE CAN ASK FROM THE SHERIFF THAN I HAVE.

CERTAINLY, IF I HAVE A SECURITY PROBLEM AND I AM AWARE OF IT AND I LET THE SHERIFF KNOW BEFOREHAND, HE WILL SEND UP ADDITIONAL BAILIFFS. BUT I WASN'T AWARE THAT IF WE HAVE A DEFENDANT ON BOND AND WE WANT FIVE BAILIFFS IN THE COURTROOM TO HELP CONTROL JURORS, THAT THE SHERIFF WOULD HONOR THAT REQUEST. I PRESUME PERHAPS HE WOULD IF HE HAD THE DEPUTIES AVAILABLE AND THEY WEREN'T TIED UP IN

SOME OTHER COURTROOM. BUT THE SHERIFF TELLS US TO LEAVE SECURITY UP TO HIM IN TERMS OF DECIDING WHAT'S APPROPRIATE, AND, GENERALLY, THAT'S WHAT THE JUDGES DO BECAUSE WE HAVE A LOT OF CONFIDENCE IN OUR SHERIFF AND IN THE COURT'S SERVICES STAFF.

AND, ALSO, JUST FOR THE RECORD, I RELY ON MY BAILIFF. IF SHE'S HERE AND I'M IN CHAMBERS, MANY TIMES I DON'T COME OUT UNTIL SOMETHING HAS HAPPENED IN THE COURTROOM. WHEN SHE FORESEES A PROBLEM, SHE CALLS DOWN AND SHE MIGHT ASK TO SEND SOMEBODY UP TO HELP HER, BUT I NEVER PRESUME TO DO THAT. SHE WOULD NEVER COME TO ME AND ASK ME TO CALL THE -- I MEAN, SHE'S NEVER DONE THAT AND NONE OF MY OTHER BAILIFFS HAVE. I JUST ASSUME THEY KNOW WHAT THEY'RE DOING. IF THEY'RE OUT HERE AND THEY NEED MORE HELP, THEY CALL DOWN AND ASK FOR IT. SO I DON'T KNOW WHAT THE SHERIFF'S POLICY IS EXACTLY EXCEPT I KNOW HE HAS TOLD THE JUDGES THAT, IF THE DEFENDANT IS ON BOND, HE SENDS LESS. THAT'S WHY HE ASSIGNS LESS BAILIFFS TO THE COURTROOM. I GUESS IT'S PRESUMED THAT THERE IS LESS OF A SECURITY RISK, WHICH I DON'T NECESSARILY AGREE WITH THAT, BUT WHO KNOWS.

WAS BRIAN NICHOLS ON BOND? HE WAS IN CUSTODY. BUT YOU NEVER KNOW.

MR. KLEINROCK: JUDGE --

THE COURT: YOUR POINT IS WELL-TAKEN.

MR. KLEINROCK: -- TO SUMMARIZE, BASICALLY, MY CONTENTION IS THAT THE LAW REQUIRES BEFORE ANY KIND OF PUBLIC IS EXCLUDED FROM THE COURTROOM, THAT THERE BE EVERY POTENTIAL ACCOMMODATION MADE TO AVOID THAT AND THAT THE RIGHT TO A PUBLIC TRIAL IS ONE OF THE MOST FUNDAMENTAL RIGHTS THERE IS AND THAT MORE ACCOMMODATION SHOULD HAVE BEEN TAKEN. JUST TO SUMMARIZE, THAT'S MY POINT FOR GROUND ONE.

GROUND TWO, MR. SHAFER DID ATTEMPT TO KEEP FROM EVIDENCE THE HEARSAY REGARDING WHAT THE CONFIDENTIAL INFORMANT HAD TOLD THE OFFICERS THE DEAL WAS SUPPOSED TO BE ABOUT. I THINK IN OPENING STATEMENT -- I DON'T HAVE THE EXACT PAGE. I THINK IT'S AROUND PAGE 84. IN OPENING STATEMENT HE OBJECTED TO THAT KIND OF EVIDENCE AND THE COURT SUSTAINED IT TO THE EXTENT THEY WERE GOING INTO THAT EVIDENCE. SO HE WAS ATTEMPTING TO KEEP THAT INFORMATION FROM THE JURY AND HE SUCCEEDED UNTIL THE POINT AT PAGE 166 WHERE IT WAS TESTIFIED TO BY AN OFFICER AND HE MADE NO EFFORT TO OBJECT TO STRIKE THE TESTIMONY TO HAVE THE JURY INSTRUCTED TO DISREGARD IT. AND I CONTEND THAT THAT'S IMPORTANT BECAUSE --

THE COURT: WHAT IS THE STATEMENT THAT HE FAILED TO OBJECT TO?

MR. KLEINROCK: THAT AT THE WENDY'S -- THIS IS THE PLACE WHERE THE DEAL WAS ORIGINALLY SUPPOSED TO TAKE PLACE

THE COURT: ALL RIGHT. DAN.

MR. QUINN: LET ME GO GRAB THE DRUGS, YOUR HONOR. IT'S MAKING ME NERVOUS BECAUSE I CAN'T SEE THEM.

I'M JUST GOING TO GO DOWN ISSUE BY ISSUE OF THE AMENDED MOTION FOR NEW TRIAL.

ISSUE ONE IS THE ALLEGATION THAT THE TRIAL WASN'T PUBLIC OR THAT THE VOIR DIRE WASN'T A PUBLIC PART OF THE TRIAL AND, OBVIOUSLY, IT'S WITHIN YOUR DISCRETION OF HOW YOU'RE GOING TO MAINTAIN THE COURTROOM, AND IF THE COURTROOM IS FULL, I THINK IT'S A PRUDENT MEASURE NOT TO HAVE POTENTIAL WITNESSES OR FAMILY MEMBERS OF THE DEFENDANT SITTING NEXT TO POTENTIAL JURORS IN A CASE. THAT'S JUST TO AVOID PROBLEMS. THIS WAS A PUBLIC TRIAL WE PUT UP THAT WAS, OBVIOUSLY, DURING VOIR DIRE FILLED WITH CITIZENS FROM DEKALB COUNTY SO THEY WERE ALL ABLE TO WITNESS THE TRIAL. AND I THINK WHAT YOU TOLD THE UNCLE AT THAT TIME WAS SIMPLY BECAUSE HE WAS A FAMILY MEMBER, YOU DID NOT WANT HIM SITTING IN THE PUBLIC WITH POTENTIAL JURORS. I THINK THAT'S JUST A PRUDENT MEASURE. I DON'T THINK ANY APPELLATE COURT IS GOING TO HAVE A PROBLEM WITH THAT. AND, OF COURSE, YOU ALSO TOLD HIM HE WAS WELCOME TO COME IN AND WATCH THE TRIAL AS SOON AS THE JURY WAS SELECTED AND OPENING STATEMENTS STARTED.

WITH REGARD TO ISSUE NUMBER TWO, WHICH IS THE INVESTIGATOR, I BELIEVE IT WAS BRITT, MENTIONING THAT

MASON TURNER. BUT THAT DOES NOT AFFECT THE CHAIN OF CUSTODY OF WHETHER THIS IS A PROPER SAMPLE OF DRUGS. THE TESTIMONY AT TRIAL WAS INVESTIGATOR BRITT TOOK THE DRUGS AND PUT THEM IN A LOCKBOX, INVESTIGATOR DEMARCO RETRIEVED THE LOCKBOX, BROUGHT IT TO THE CRIME LAB, AND THEN, OF COURSE, SHENIKA LINEN TESTED THEM, SO THE CHAIN OF CUSTODY WAS SUFFICIENTLY PROVEN. AND, AS MR. SHAFER TESTIFIED, HE DIDN'T SEE ANY REASON TO GO ANY FURTHER INTO THAT AND THAT WAS THE REASON FOR HIS DECISION.

THE STATE WOULD SIMPLY REQUEST, YOUR HONOR, THAT THE MOTION FOR NEW TRIAL AS AMENDED BE DENIED AND THAT THE DEFENDANT BE RETURNED TO THE PRISON SYSTEM.

THE COURT: ANYTHING FURTHER?

MR. KLEINROCK: YES, JUDGE. MR. QUINN ARGUED THAT THE COURTROOM WAS FILLED WITH CITIZENS, BUT, OF COURSE, THE JURY IS NOT ALLOWED TO BE PRESENT FOR CERTAIN DISCUSSIONS AND PORTIONS OF THE TRIAL SO THEY ARE NOT THE PUBLIC THAT WE'RE TALKING ABOUT THAT IS PRESENT DURING THE TRIAL. CERTAINLY, THE JURY IS PRESENT FOR EVERY TRIAL. AND IF THAT WERE GOOD ENOUGH, WE COULD CLOSE THE COURTROOM AND LET --

THE COURT: OF COURSE, THERE IS A EUPHEMISM. THIS COURTROOM WAS NEVER CLOSED. WE SIMPLY HAD AN OVERFLOW AND I COULD NOT HAVE FAMILY MEMBERS SITTING IN THE COURTROOM WITH THE JURORS BECAUSE THE JURORS TOOK UP ALL THE

AVAILABLE SPACE IN MY COURTROOM FOR THAT PARTICULAR TRIAL, SO THIS COURTROOM WAS NEVER CLOSED. IT WAS SIMPLY THAT I EITHER STRUCK A JURY OR I LET THE DEFENDANT'S FAMILY SIT IN HERE AND NOT STRIKE A JURY. BUT I THINK MR. QUINN POINTED TO A STATEMENT WHERE I INDICATED TO THE DEFENDANT'S UNCLE THAT HE COULD NOT SIT WITH JURORS OUT IN THE COURTROOM AND THAT HE WAS WELCOME TO COME BACK AFTER WE SELECTED THE JURY, BUT THIS COURTROOM WAS NEVER CLOSED. IT WAS ALWAYS OPEN. IT WAS ALWAYS A PUBLIC TRIAL. I SIMPLY COULD NOT ACCOMMODATE EVERYBODY WHO WANTED TO BE HERE. AND IN TERMS OF PRIORITY, THE PRIORITY WAS TO STRIKE A JURY SO WE COULD TRY MR. PRESLEY'S CASE AND I HAD TO HAVE ROOM FOR THE JURORS.

MR. KLEINROCK: JUDGE, I OBVIOUSLY DISAGREE.

THE COURT: I KNOW IT WAS YOUR OPINION THAT MEANT I SHOULD HAVE LET HIS UNCLE, HIS FAMILY MEMBERS SIT OUT IN THE AUDIENCE ON THE SAME ROWS OR INTERMINGLE WITH THE JURORS, BUT, YOU KNOW, REASONABLE MINDS ARE DIFFERENT. I DON'T THINK THAT'S APPROPRIATE. YOU KNOW, IF I HAD LET SOME OF THE STATE'S WITNESSES, IF I HAD LET DETECTIVE BRITT AND DETECTIVE RIOS SIT OUT IN THE AUDIENCE WHILE WE WERE PICKING A JURY, I'M SURE I WOULD HAVE GOTTEN REVERSED, AND SIT ON THE ROWS WITH THE JURORS. IT'S JUST NOT APPROPRIATE. BOTH THE STATE AND THE DEFENSE ARE ENTITLED TO A FAIR TRIAL. THE DEFENDANT'S UNCLE HAS NO

MORE RIGHT TO SIT ON THE SAME ROWS AND INTERMINGLE WITH THE JURORS AND POTENTIALLY TAINT OR PREJUDICE THE JURORS THAN DOES THE STATE'S WITNESSES. I DON'T LET THE STATE'S INVESTIGATORS SIT ON THE ROWS WITH THE JURORS. EVEN IF THEY HAVE INTERNS WHO WANT TO OBSERVE A TRIAL, THEY CAN'T SIT OUT WITH THE JURY. THEY EITHER SIT AT THE STATE'S TABLE OR THEY WAIT OUTSIDE UNTIL WE CAN ACCOMMODATE THEM JUST LIKE EVERYBODY ELSE. BUT THE COURTROOM WAS NEVER CLOSED. IT WAS ALWAYS A PUBLIC TRIAL.

THE ISSUE IS WHEN THERE WAS AN OVERFLOW, WHO DECIDES WHOM TO ACCOMMODATE AND HOW TO ACCOMMODATE THEM. AND, IN MY OPINION, IT'S LEFT TO THE SOUND DISCRETION OF THE TRIAL JUDGE, BUT I UNDERSTAND YOUR POINT. I JUST WANTED TO PUT ON THE RECORD AND THE RECORD WILL REFLECT THIS COURTROOM WAS NEVER CLOSED AND THAT IT WAS ALWAYS A PUBLIC TRIAL.

IS THERE ANYTHING ELSE?

MR. KLEINROCK: JUDGE, OBVIOUSLY I DISAGREE WITH THAT BUT --

THE COURT: WHERE IN THE RECORD DOES IT SHOW THAT THIS WAS A CLOSED COURTROOM AND THAT THE PUBLIC WAS NOT ACCOMMODATED? IT WASN'T ACCOMMODATED TO YOUR SPECIFICATIONS BUT THE PUBLIC WAS ACCOMMODATED. THERE IS NOTHING IN THE RECORD TO SHOW THAT THIS COURTROOM WAS EVER CLOSED. THE DOORS WERE NEVER LOCKED. NO ONE WAS BARRED FROM COMING IN, BUT I DID MAINTAIN CONTROL OF MY COURTROOM

THE WAY THAT I THOUGHT WAS APPROPRIATE SO THAT WE COULD HAVE A FAIR TRIAL AND NOT HAVE A MISTRIAL BASED ON SOME COMMENT THAT A JUROR OVERHEARD, SAY, THE DEFENDANT'S UNCLE MADE WHILE HE'S SITTING NEXT TO ONE OF THEM OR BEHIND ONE OF THEM.

MR. KLEINROCK: JUDGE, MY POINT IS THAT AN ACCOMMODATION COULD HAVE BEEN MADE USING JUST HALF THE COURTROOM FOR THE JURORS AND THE OTHER HALF FOR ANY SPECTATORS THAT WANTED TO WATCH.

THE COURT: WELL, I THINK THE PICTURES WILL SHOW I COULDN'T GET 42 JURORS IN THE BOX AND ON ONE HALF OF THE COURTROOM UNLESS I PUT THEM SHOULDER TO SHOULDER AND ELBOW TO ELBOW. AND, IN MY OPINION, THAT'S NOT A COMFORTABLE WAY TO SEAT A JURY WHEN THEY'RE GOING TO BE HERE FOR A DAY OR EVEN FOR FOUR OR FIVE HOURS.

MR. KLEINROCK: WE CAN DISAGREE ABOUT THE FACTS.

THE COURT: YES.

MR. KLEINROCK: JUDGE, MR. QUINN ALSO ARGUED THAT MR. SHAFER THOUGHT IT WAS FRUITLESS TO POINT OUT TO THE JURY THAT ONLY A VERY SMALL PORTION OF THE DRUGS WERE TESTED. HE CAN THINK THAT. THE QUESTION IS IS HE RIGHT TO THINK THAT? IS THERE ANY VALID REASON NOT TO PRESENT THAT EVIDENCE AND THERE ISN'T. IT DOESN'T HARM HIS CASE JUST TO ASK HER HOW MUCH OF THIS DID YOU ACTUALLY TEST. I DEMONSTRATED HOW YOU COULD DO THAT AND WHAT THE ANSWERS

TRIAL.

THE COURT: WELL, YOU KNOW, I DID ACTUALLY SIT AS THE TRIAL JUDGE. GERARD, YOU HAVE RAISED SOME GOOD POINTS, BUT I DON'T THINK THEY RISE TO THE LEVEL OF INEFFECTIVE ASSISTANCE OF COUNSEL. I DO DISAGREE WITH YOU ABOUT WHETHER OR NOT THE PUBLIC WAS EXCLUDED FROM THE TRIAL. THE RECORD WILL REFLECT THAT THE PUBLIC WAS NOT. BUT I HAD TO ACCOMMODATE JURORS AND DECIDED NOT TO PACK AS MANY JURORS AS I COULD PACK ON EACH ROW DUE TO THE LENGTH OF THE QUESTIONING.

AND EVEN ASSUMING, YOU KNOW, PERHAPS JUST FOR THE SAKE OF ARGUMENT, ASSUMING ARGUENDO THAT MR. SHAFER SHOULD HAVE MADE OBJECTIONS, CERTAIN OBJECTIONS AT CERTAIN TIMES AND EMPLOYED THE TYPE OF TRIAL STRATEGY WHICH YOU'VE ENUMERATED, I DON'T THINK THAT IT SHOWS PREJUDICE TO YOUR CLIENT, AND I WOULD EXERCISE MY DISCRETION AND DENY THE MOTION FOR NEW TRIAL.

AND IF THE GEORGIA SUPREME COURT FINDS THIS MINNESOTA CASE PERSUASIVE OR THE APPELLATE COURTS, THEY CAN CERTAINLY LET US KNOW, BUT I'M NOT PREPARED TO SET THE SAME STANDARDS THAT THE SUPREME COURT OF MINNESOTA HAS SET. IT'S MY UNDERSTANDING OF THE CASE LAW IN GEORGIA THAT THAT IS NOT THE LAW IN GEORGIA, AND I WOULD NOT ADOPT THIS HOLDING IN ROBINSON FROM THE SUPREME COURT OF MINNESOTA.

DEFENDANT'S
EXHIBIT
1

BEST AVAILABLE COPY

DEFENDANT'S
EXHIBIT
2

DEFENDANT'S EXHIBIT
— 3 —

DEFENDANT'S
EXHIBIT
4

DEFENDANT'S
EXHIBIT
S

C-E-R-T-I-F-I-C-A-T-E

STATE OF GEORGIA:

COUNTY OF DEKALB:

I, A. DEANN LANDON, OFFICIAL COURT REPORTER, HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT WAS TAKEN DOWN, AS STATED IN THE CAPTION, AND THE COLLOQUIES, QUESTIONS AND ANSWERS WERE REDUCED TO PRINT BY ME OR UNDER MY DIRECTION; THAT THE FOREGOING PAGES REPRESENT A TRUE, CORRECT AND COMPLETE RECORD OF THE EVIDENCE GIVEN.

THE ABOVE CERTIFICATION IS EXPRESSLY WITHDRAWN AND DENIED UPON THE DISASSEMBLY AND/OR PHOTOCOPYING OF THE FOREGOING TRANSCRIPT, OR ANY PART THEREOF, INCLUDING EXHIBITS, UNLESS SAID DISASSEMBLY AND/OR PHOTOCOPYING IS DONE UNDER THE AUSPICES OF THE UNDERSIGNED AND THE SIGNATURE AND ORIGINAL SEAL ATTACHED THERETO.

I FURTHER CERTIFY THAT IN ACCORDANCE WITH OCGA 9-11-28(A) I AM NOT A RELATIVE, EMPLOYEE, ATTORNEY, OR COUNSEL OF ANY PARTY, NOR AM I FINANCIALLY INTERESTED IN THE ACTION.

THIS, THE 12TH DAY OF AUGUST, 2007.

A. DEANN LANDON, CCR B-2250

WELCOME TO COME IN AFTER WE PLETE [SIC] -- COMPLETE SELECTING THE JURY THIS AFTERNOON. BUT, OTHERWISE, YOU WOULD HAVE TO LEAVE THE SIXTH FLOOR, BECAUSE JURORS WILL BE ALL OUT IN THE HALLWAY IN A FEW MOMENTS. THAT APPLIES TO EVERYBODY WHO'S GOT A CASE.

MR. SHAFER: YOUR HONOR, WITH THE UTMOST DEFERENCE AND RESPECT, I MUST RESPECTFULLY OBJECT TO THE EXCLUSION OF THE PUBLIC FROM THE COURTROOM.

THE COURT: I'M NOT EXCUSING THE PUBLIC FROM THE COURTROOM. THERE JUST ISN'T SPACE FOR THEM TO SIT IN THE AUDIENCE. WE HAVE VERY SMALL COURTROOMS, AND THE WITNESSES AND RELATIVES CANNOT SIT IN THE AUDIENCE BESIDE THE POTENTIAL JURORS. THAT WILL BE GROUNDS FOR A MISTRIAL, AND BECAUSE OF A TAINTED JURY PANEL.

MR. SHAFER: WELL, I'M, I'M WONDERING, YOUR HONOR, WHETHER --

THE COURT: HE CAN CERTAINLY COME --

MR. SHAFER: -- SOME ACCOMMODATION COULD NOT BE MADE FOR BOTH, SOME OF THOSE MEMBERS OF THE FAMILY AND THE JURORS?

THE COURT: WELL, THE UNCLE CAN CERTAINLY COME BACK IN ONCE THE TRIAL STARTS. THERE'S NO, REALLY NO NEED FOR THE UNCLE TO BE PRESENT DURING JURY SELECTION. WHEN THE TRIAL STARTS, HE CAN CERTAINLY COME BACK INTO THE COURTROOM. BUT HE -- WE HAVE 42 JURORS COMING UP. EACH

OF THOSE ROWS WILL BE OCCUPIED BY JURORS. AND HIS UNCLE CANNOT SIT AND INTERMINGLE WITH MEMBERS OF THE JURY PANEL. BUT, WHEN THE TRIAL STARTS, THE OPENING STATEMENTS AND OTHER MATTERS, HE CAN CERTAINLY COME BACK INTO THE COURTROOM.

MR. SHAFER: I AM BOUND BY THE COURT'S RULING, BUT I RESPECTFULLY EXCEPT TO IT.

THE COURT: THAT'S FINE. I UNDERSTAND, MR. SHAFER.

(WHEREUPON, AN OFF-THE-RECORD DISCUSSION WAS HELD BETWEEN THE COURT AND PROBATION OFFICER, SIDEBAR.)

THE COURT: I GUESS, MR. PRESLEY, ARE YOU DEFINITELY GOING -- MY PROBATION OFFICER NEEDS TO KNOW IN CASE SHE NEEDS TO STAY FOR A PLEA?

THE DEFENDANT: NO.

THE COURT: ALL RIGHT. SO HE'S ANSWERED THE QUESTION.

(WHEREUPON, MR. SHAFER APPROACHED THE PODIUM.)

MR. SHAFER: YOUR HONOR, THERE ARE TWO MATTERS THAT I BELIEVE SHOULD BE.--

THE COURT: EXCUSE ME, MR. SHAFER.

MR. SHAFER: I'M SORRY, YOUR HONOR.

THE COURT: I WAS TRYING TO FIND OUT FROM THE CLERK IF I ACTUALLY HAVE THE FILE IN THIS CASE.

HERE IT IS. I HAVE IT.

MR. SHAFER: OKAY.

THE COURT: YES, I THINK WE HAVE ENOUGH PAPERWORK.

THE JURY CLERK: OKAY.

(WHEREUPON, THE PROSPECTIVE JURORS ENTERED THE COURTROOM ONE AT A TIME AS FOLLOWS:)

THE COURT: ALL RIGHT. JUROR NUMBER 1, MR. MARK EILLIOTT? IF MR. MARK ELLIOTT COULD ENTER INTO THE COURTROOM? MARK ELLIOTT?

ALL RIGHT. MR. ELLIOTT, IF YOU COULD FOLLOW THE BAILIFF?

NOW, ARE YOU GOING TO HAVE ANYBODY ELSE ASSISTING YOU, MR. BAILIFF? ARE YOU BY YOURSELF THIS AFTERNOON?

THE DEPUTY SHERIFF: I'M BY MYSELF TODAY, JUDGE, YOUR HONOR.

THE COURT: I THOUGHT BE WERE SUPPOSED TO HAVE TWO.

THE DEPUTY SHERIFF: ONLY WHEN THEY'RE NEEDED.

THE COURT: I KNOW, BUT THAT'S STILL --

THE DEPUTY SHERIFF: BUT I'VE BEEN --

THE COURT: CAN YOU HANDLE EVERYTHING?

THE DEPUTY SHERIFF: (NODS HEAD AFFIRMATIVELY.)

THE COURT: ALL RIGHT. JUROR NUMBER 2, SHIRLEY RANDOLPH.

JUROR NUMBER 3, WILLIE MITCHELL.

JUROR NUMBER 4, KELLY MAUREEN KENNEDY.

NUMBER 5, CONNIE MILLER.

NUMBER 6, ELIZABETH WORSHAM LEBLANC.

AND, NUMBER 7, RECO SCOTT.

THAT SHOULD COMPLETE THE FIRST AND BOTTOM ROW OF THE JURY BOX.

JUROR NUMBER 8, KEVIN MCGOLDRICK.

IS YOUR NAME KEVIN?

THE PROSPECTIVE JUROR: YES, IT IS.

THE COURT: OKAY. IS THAT MRS. KEVIN?

A PROSPECTIVE JUROR: (NODS HEAD AFFIRMATIVELY).

THE COURT: JUROR NUMBER 9, ELI WARREN WARNOCK.

JUROR NUMBER 10, WILLIE WASHINGTON.

JUROR NUMBER 11, BRUCE RAD, RAD [SIC] -- IS IT RADO [PRONUNCIATION] OR RADO [PRONUNCIATION]?

A PROSPECTIVE JUROR: RADO [PRONUNCIATION].

THE COURT: RADO [PRONUNCIATION]. THANK YOU.

JUROR NUMBER 12, WILLIAM HARDING.

JUROR NUMBER 13, CHERLY ANN SALTER.

AND, JUROR NUMBER 14, JASON GIFFORD.

ALL RIGHT. THE NEXT -- THAT COMPLETES OUR JURY BOX.

THE NEXT SIX JURORS WILL BE SEATED ON THIS ROW OUT IN THE AUDIENCE.

DARNISHA TRANIECE BAR -- BARRETT -- IS IT BARRETT [PRONUNCIATION]?

A PROSPECTIVE JUROR: BARRETT [PRONUNCIATION].

THE COURT: I'M SORRY. I'M GETTING TONGUE-TIED THIS AFTERNOON.

DO YOU HAVE A NUMBER, MA'AM?

A PROSPECTIVE JUROR: YES, MA'AM.

THE COURT: DO YOU MIND PUTTING IT ON, BECAUSE WE, THE JURORS CORRESPOND.

A PROSPECTIVE JUROR: HOW DO YOU PUT IT ON?

THE COURT: IT HAS -- YOU HAVE TO PULL OFF THAT STICKY PART ON THE BACK, AND THEN IT WILL STICK.

OH, YOU DON'T HAVE -- NO ONE HAS THEIR NUMBERS ON. WE, THE ATTORNEYS REFER TO YOU BY NUMBER, AND SO THE NUMBERS CORRESPOND TO THIS SHEET. SO THAT'S WHY YOU HAVE TO HAVE THOSE NUMBERS ON.

ALBERT SANDLIN, JR., NUMBER 16.

NUMBER 17, ROBERT BROWN.

NUMBER 18, HENRY OAT.

NUMBER 19, CARMEN DOZIER.

AND, NUMBER 20, KEITH RUTHERFORD.

ALL RIGHT. JUROR NUMBER 21, BRENDA ROBINSON.

NUMBER 22, KAREN KILLIAN.

NUMBER 23, AMY CONGER.

NUMBER 24, GINA SHIN?

A PROSPECTIVE JUROR (#24): YES, MA'AM.

THE COURT: NUMBER 25, RUFUS WILKES, JR.

AND, NUMBER 26, DANIEL EUGENE SEYMOUR.

NUMBER 27, MS. VICKIE JOHNSON.

28, TOMMIELENE MATHIS.

29, AMANDA LAMM.

30, MICHAEL GAUTHIER. IF THAT'S CORRECT? GAUTHIER [PRONUNCIATION]?

A PROSPECTIVE JUROR (#30): GAUTHIER [PRONUNCIATION].

THE COURT: GAUTHIER [PRONUNCIATION].

31, VIRGINIA HILL.

AND, 32, MARCIA PETERS.

JUROR NUMBER 33, VALERIE VICKERY. IF YOU'LL SIT ON THIS SIDE, MA'AM?

34, EDWARD WOOLF. YES, JUST CALLING OUT YOUR NAME, SIR.

NUMBER 35, MICAELA MARIE JOHNSON.

36, PHILLIP WAYNE KNIGHT. ARE YOU 36? 36, IS THAT PHILLIP WAYNE KNIGHT. I'M NOT -- MR. BAILIFF, CAN YOU CHECK AND SEE WHO HE IS? I'M NOT SURE IF HE HEARD ME.

(WHEREUPON, AN OFF-THE-RECORD DISCUSSION WAS HELD BETWEEN THE DEPUTY SHERIFF AND THE PROSPECTIVE JUROR.)

THE COURT: ARE YOU PHILLIP WAYNE KNIGHT?

A PROSPECTIVE JUROR (#36): PHILLIP (NODS HEAD AFFIRMATIVELY.)

THE COURT: ALL RIGHT. THANK YOU. I JUST WANTED TO MAKE SURE YOU WEREN'T OUT OF ORDER.

37, BOBBY SMITH.

A PROSPECTIVE JUROR: RIGHT HERE.

THE DEPUTY SHERIFF: HAVE A SEAT, SIR.

THE COURT: AND, 36, AMY MICHELLE DONSKY.

39, RALPH CANTU.

A PROSPECTIVE JUROR: HERE.

THE DEPUTY SHERIFF: FIRST ONE, SIR.

THE COURT: 40, COLIN NICHOLAS BARKER.

41, WILLIAM CURTIS PARROTT.

AND 42, TYNA SIMS.

A PROSPECTIVE JUROR: YES.

(WHEREUPON, ALL JURY PANELS WERE SEATED IN THE COURTROOM.)

THE COURT: ALL RIGHT. GOOD AFTERNOON, EVERYONE.

THE JURY PANELS: GOOD AFTERNOON.

THE COURT: I'M JUDGE HUNTER, AND THIS, I BELIEVE IT'S THE THIRD WEEK OF A CRIMINAL JURY TRIAL CALENDAR I'M CONDUCTING THIS TERM. WE ACTUALLY STARTED OUR CALENDAR SEPTEMBER 8TH, AND WE'VE BEEN IN TRIAL FOR SOMETIME, AND WE EXPECT OUR CALENDAR TO END ON OCTOBER 7TH.

NOW, I SAY THAT BECAUSE MANY TIMES JURORS, YOU KNOW, THINK THAT THE CASE THEY'RE COMING UP ON IS THE ONLY CASE ON THE JUDGE'S CALENDAR AND WHY IS THE JUDGE KEEPING US DOWNSTAIRS ALL MORNING, YOU KNOW, WHAT IS THE JUDGE DOING? BUT, YOU KNOW, WE'RE VERY BUSY HERE IN THE METROPOLITAN AREA. WE HAVE A NUMBER OF CASES ASSIGNED TO THE JUDGES. AND MY CRIMINAL CALENDARS GENERALLY LAST

C E R T I F I C A T E

COPY

STATE OF GEORGIA,

COUNTY OF DEKALB:

I DO HEREBY CERTIFY THAT THE FOREGOING PAGES 1 THROUGH 66, CONTAINED IN VOLUME I OF III VOLUMES, ARE A TRUE, COMPLETE, AND CORRECT TRANSCRIPT OF THE PROCEEDINGS TAKEN DOWN BY ME IN THE CASE AFORESAID.

THIS CERTIFICATION IS EXPRESSLY WITHDRAWN AND DENIED UPON THE DISASSEMBLY OR PHOTOCOPYING OF THE FOREGOING TRANSCRIPT, OR ANY PART THEREOF, INCLUDING EXHIBITS, UNLESS SAID DISASSEMBLY OR PHOTOCOPYING IS DONE BY THE UNDERSIGNED OFFICIAL COURT REPORTER AND ORIGINAL SIGNATURE AND SEAL IS ATTACHED THERETO.

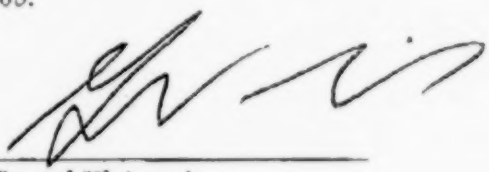
THIS, THE 28TH DAY OF APRIL, 2006.

Jenny D. Wickham

JENNY D. WICKHAM, RPR, CCR-B-622
OFFICIAL COURT REPORTER
DEKALB SUPERIOR COURT

DISASSEMBLY OR PHOTOCOPYING OF OFFICIAL COURT REPORTER'S TRANSCRIPT, UNLESS DONE BY OFFICIAL COURT REPORTER, INVALIDATES TRANSCRIPT CERTIFICATION OF SAID COURT REPORTER

The forgoing 69 pages, consisting of appendices A through F, are submitted to the Court this 9th day of July, 2009.



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OPPOSITION BRIEF

RESPONSE REQUESTED

Supreme Court, U.S.
FILED
NOV - 2 2009
OFFICE OF THE CLERK

ORIGINAL

NO. 09-5270

IN THE SUPREME COURT OF THE UNITED STATES

ERIC PRESLEY,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

Should this Court grant certiorari to consider the fact-bound decision of the state appellate court finding that Petitioner's right to a public trial was not violated by the closure of voir dire at his criminal trial?

II.

Should this Court grant certiorari to consider a purported split in authority on whether the proponent or opponent of closure has the burden to suggest alternatives to closure, as the question is not adjusted to this case, because the trial court acted sua sponte, and the "strict scrutiny" argument was not raised below?

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NO. 09-5270

IN THE SUPREME COURT OF THE UNITED STATES

ERIC PRESLEY,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

RESPONDENT'S BRIEF IN OPPOSITION

I. STATEMENT OF THE CASE

Petitioner Eric Presley (hereinafter "Petitioner") was indicted by the DeKalb County, Georgia, grand jury in 2004 for two counts of trafficking in cocaine, five counts of Violation of the Georgia Controlled Substances Act ("VGCSA") and two counts of possession of a firearm by a convicted felon.

At a jury trial in 2005, the trial court sua sponte inquired into the presence of a gentleman in the courtroom who turned out to be Petitioner's uncle, ascertained that he did not

have a case, and instructed him and all other observers in the courtroom that, when prospective jurors were brought into the courtroom, non-jurors could not sit on the same rows with jurors. (Pet. App. pp. 59-63). The court eventually instructed the uncle to leave the courtroom but clearly noted he could return after jury selection was done. Id. at 61-63. Though the defense asked whether "some accommodation" could be made for both family members and jurors, Petitioner offered no suggestions and then excepted to the court's ruling denying the request. Id.

A jury was selected and given preliminary instructions. Id. at 64-68. The next morning, the trial court gave additional preliminary instructions, which included the admonition to avoid contact with anyone who was not a member of the jury panel, other than a bailiff, and to report any attempted contacts of jurors by others to the bailiff. (Trial Transcript pp. 76-83). The court added:

> I believe yesterday someone who is not a member of the panel, someone who was interested in the outcome of this case, happened to know one of the jurors and went up and had a conversation with the juror and hugged that juror.

(T. 83) (Attachment A).

During the ensuing trial, the trial court granted Petitioner's motions for directed verdicts of acquittal on all

other counts except one trafficking count and one VGCSA count (counts, 3, 4). The jury found Petitioner guilty of the two remaining counts, and the trial court imposed a "split" 20-year sentence for trafficking, 15 years to serve and the balance probated, and imposed a $200,000 fine.. The VGCSA count merged into the trafficking count for sentencing.

Through new post-trial counsel, Petitioner amended the motion for new trial to allege, in pertinent part, that the trial court erred in refusing to make an accommodation to allow Petitioner's family to observe the entire trial, citing page 5 of the trial transcript, the Sixth and Fourteenth Amendments of the United States Constitution, and corresponding provisions of the Georgia Constitution. (Attachment B). At the May 2007 motion for new trial hearing, presided over by the trial judge, Petitioner presented evidence on the closure issue[1]. (Pet. App. pp. 17-58).

The trial court denied the motion for new trial six days later. Id. at 12-15. The court ruled as to the closure issue:

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[1] Though Petitioner presented testimony from a deputy/bailiff, the bailiff had never been assigned to the courtroom of the presiding judge, had no personal knowledge of the judge's preferences for handling voir dire, and was not present at Petitioner's trial. (Pet. App. pp. 25, 32). If a criminal defendant was on bond, only one deputy would be present in the courtroom to provide security. Id. at 30. An investigator for the defense, who took the photographs of the courtroom admitted at the post-trial hearing, was not present at Petitioner's trial. Id. at 35, 36. Petitioner's former trial counsel also testified at the hearing, but was not asked about the closure issue.

> The Court finds that the evidence does not show that the Court closed the courtroom to the public during voir dire. The Court reasonably instructed Defendant's uncle that he could not sit out in the courtroom next to the prospective jurors during voir dire due to the limited space in the courtroom. [Cit. omitted]. The Court was also concerned about the possibility of misconduct should there be any interaction between the Defendant's uncle and potential jurors in this case. The Court informed Defendant's uncle that he was welcome to return to the courtroom after the jury had been selected and before opening statements. (T I 3-5).

(Pet. App. pp. 12-13).

On direct appeal, as one of the enumerations of error Petitioner challenged the trial court's ruling on the closure issue, but the Court of Appeals found no error. Presley v. State, 290 Ga. App. 99, 658 S.E.2d 773 (2008) (Pet. App. pp. 8-11).

Petitioner then petitioned for certiorari to the Georgia Supreme Court, and that Court granted the petition and asked the parties to address the following question:

> Did the Court of Appeals err in applying the abuse of discretion standard to the trial court's closure of a courtroom for voir dire.

(Attachment C).

In the Georgia Supreme Court, Petitioner asserted that the trial court had violated both his state and federal

constitutional rights to a public trial. (Attachments D, E).[2] His arguments about who should bear the burden of proof on suggesting alternatives to closure was made on state law grounds only. Id.

On March 23, 2009, the Georgia Supreme Court affirmed the Court of Appeals' ruling, after finding no error in the trial court's ruling. Presley v. State, 285 Ga. 270, 674 S.E.2d 909 (2009) (Pet. App. pp. 1-7).

The Supreme Court quoted extensive portions of the trial court's colloquy with Petitioner's uncle, as well as Petitioner's colloquy with the court, and made additional fact findings about the evidence presented at the motion for new trial hearing about how many prospective jurors could have been seated comfortably in the courtroom. Id. at 2-3. The Court also noted that Petitioner presented no testimony about "how many observers were in the courtroom at the time of the trial court's announcement regarding voir dire." Id. at n.1. The Court also noted, "No persons who were excluded from the

[2] For brevity, only the cover page, the table of contents and pages 7-14 of the initial appellant's brief are relevant and appended in Attachment D; only the cover page and pages 4-8, addressing the issue of who should bear the burden to suggest alternatives, are relevant and appended in Attachment E.

courtroom sought have relief in the case." Id. at n. 2 (citing R.S. Page Corp. v. Lumpkin, 249 Ga. 576, 292 S.E.2d 815 (1982)[3]).

Applying the test from Waller v. Georgia, 464 U.S. 501 (1984), the Georgia Supreme Court found that the trial court had an overriding interest in making sure that potential jurors heard no prejudicial remarks from observers; that the decision to exclude was made in part to prevent intermingling of prospective jurors and observers; the order was not overbroad, as it was only for the duration of voir dire; and that neither party had suggested alternatives to closure, the trial court was not required to consider alternatives sua sponte on the record, and Petitioner should have presented any alternatives in keeping with the state appellate precept that a party must raise the issue at the time of the trial court's action in order to afford the court the chance to take any remedial action. Presley, 285 Ga. at 272-73 (Pet. App. pp. 3-4). In a footnote, the Court declined to characterize the trial judge's role as "the 'movant' wishing closure" under Lumpkin since neither party had moved for closure. Presley, 285 Ga. at 274 n.5. The Court denied rehearing. Id. at 276.

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[3] Lumpkin was an appeal by members of the press who had been excluded from a Jackson-Denno hearing held after the jury had been impaneled; though the Court addressed both federal and state constitutional rights to a public trial, the decision rested on state constitutional grounds.

Petitioner now seeks certiorari review of his claim that his Sixth Amendment right to a public trial was violated when the trial court sua sponte closed the courtroom during voir dire. Petitioner raises two questions on which he seeks review, but Respondent urges the Court to decline to grant certiorari. The first question regarding the type of evidentiary showing required to warrant closure has already been answered by this Court. The second questions regarding a purported "split" on whether the proponent or opponent of closure has the duty to suggest alternatives to closure is not adjusted to the facts of this case as the trial court, who is not a party or a movant, ordered closure sua sponte and as Petitioner raised no argument below on whether a federal "strict scrutiny" standard would or should apply to govern where the burden lies.[4]

Due to the nature of the issue presented, Respondent does not set forth a statement of facts underlying Petitioner's crime but relies on the fact found by the Court of Appeals, as does Petitioner himself. Presley, 290 Ga. App. at 99-100.

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[4] Respondent further notes that the Amicus Brief of the Reporters Committee for Freedom of the Press urges the Court to grant review to vindicate First Amendments interests. However, no First Amendment issues were raised in nor decided by the Georgia Supreme Court. Similarly, the Amicus Brief of Georgia Association of Criminal Defense Lawyers urges the Court to grant review to consider the issue of whether the denial of a public trial is subject to harmless error review, but the Georgia Supreme Court did not find any constitutional error, much less determine if such an error was subject to such analysis.

Petitioner does not challenge the facts found by the Georgia Supreme Court on the closure issue. (Petition, p. 3). Respondent adopts and incorporates the Georgia Supreme Court's fact findings. Presley, 285 Ga. at 270-72. Respondent also adopts and incorporates by reference herein facts found by the trial court, referenced above, and will develop additional facts as needed to address Petitioner's claims.

II. REASONS FOR NOT GRANTING THE WRIT

A. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW THE FACT-BOUND DECISION IN THIS CASE.

Petitioner first asks this Court to grant certiorari to decide whether "case-specific evidence" or "generalized fears" meet the Court's "'substantial probability'" test for closure under Waller v. Georgia and its predecessors. (Petition, p. i, 10-17). Respondent urges the Court to decline to grant certiorari on this issue, as no new question not previously decided by this Court is presented and where the state appellate court's fact-bound decision provides no basis for the grant of certiorari.

This Court's decision to grant certiorari is motivated by many factors other then the perceived correctness of the decision below. Ross v. Moffitt, 417 U.S. 600, 616-17 (1974). Petitioner's real complaint is with the result the Georgia

Supreme Court reached under the facts of his case, not the test that the Court applied.

The Georgia Supreme Court applied the test from Waller v. Georgia, in which this Court held that an accused's Sixth Amendment right to a public trial extended to a suppression hearing, conducted before presentation of evidence to a jury, and that "any closure of a suppression hearing over the objections of the accused must meet the tests set out in Press-Enterprise[5] and its predecessors." Waller, 467 U.S. at 43, 47. In Press-Enterprise and its predecessors, this Court found that the press and the public had a "qualified First Amendment right to attend a criminal trial." Waller, 467 U.S. at 44. In each case this Court had made clear that "the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." Id. at 45.

> Under Press-Enterprise, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Waller, 467 U.S. at 47.

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[5] Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984).

Applying these factors, the Georgia Supreme Court found that the trial court's sua sponte action was justified under the facts of this case. Presley, 285 Ga. at 272. At noted above in Part I, the Supreme Court found that the trial court "had an overriding interest in ensuring that potential jurors heard no inherently prejudicial remarks from observers during voir dire"; that the decision was based in part on the arrangement of the courtroom to avoid non-jurors intermingling with potential jurors; and that the trial court's decision was not overbroad, since it was only for voir dire itself. Id. The Court implicitly found that the trial court's findings were adequate to support the closure decision. Id. The third Waller factor, regarding the trial court's consideration of alternatives to closure, will be discussed below in connection with Petitioner's second question.

Petitioner claims that other courts have required "case-specific evidence" to meet Waller's first prong or the "substantial probability" test of Press-Enterprise II[6], but that the Georgia Supreme Court only requires "generalized fears" or "amorphous possibilities." (Petition, p. ii, 10). The record does not support either characterization and is Petitioner's attempt to vitiate the Supreme Court's fact findings.

[6] Press-Enterprise Co. v. Superior Court of California, 478 U.S. 648 (1986).

Furthermore, the cases that Petitioner cites in footnote 8 of his petition are themselves fact-specific applications of this Court's standard. Indeed in Waller, this Court found that the state's proffer for closure was not specific enough to identify whose private interests might be infringed, how those interests would be infringed, what portions of the tapes would infringe them, and what portion of the evidence to be presented at the suppression hearing consisted of the tapes, which resulted in turn in broad and general findings by the trial court that did not justify the blanket closure. Waller, 467 U.S. at 48.

Petitioner further asserts that the decision in this case signals that "voir dire in Georgia is now presumptively closed - or at least presumptively closable - at the whim of the trial judge." (Petition, p. 16). That is exaggeration and speculation. The Georgia Supreme Court applied this Court's test to the facts of this case and reached a result with which Petitioner disagrees.

Here, the "gentleman in the black shirt" had obviously done something to have called himself to the attention of the trial court. The court's concerns about non-jurors sitting with or speaking to potential jurors were stated on the record, buttressed with the court's desire to have potential jurors, who

were strangers to each other, seated comfortably in the courtroom and not "crammed" together. The court's concerns about improper contact between jurors and non-jurors were broached the next morning during additional preliminary instructions, with the court remarking upon an incident of inappropriate interaction the day before between a juror and someone who had an interest in the case. (T. 83). At the motion for new trial hearing, the court noted it was "interesting" that Petitioner had not called any bailiff who had ever been assigned to her courtroom about how the judge would ordinarily have jurors on every row in the audience; the court remarked that it did not permit family members or witnesses for either party to sit on the rows with jurors; and the court had also considered security as there was only one bailiff in the courtroom since Petitioner was not in custody during trial. (Pet. App. pp. 38-45).

More importantly, the jury had not been impaneled for Petitioner's trial. The trial court was attempting to protect his right to an impartial jury.

Petitioner also argues that the Georgia Supreme Court "affirmed a trial court that shamelessly and routinely closed

voir dire as a matter of standing policy,"[7] but Petitioner presented no evidence to substantiate this sweeping assertion. Despite an opportunity to do so, he presented nothing to show that the judge had ever closed voir dire in a prior case. His cavalier and unsubstantiated assertions provide no basis for the grant of certiorari.

In conclusion, the Georgia Supreme Court applied the governing authority and reached a result based on the facts of this case. No new question not previously resolved by this Court is presented, so that Respondent urges the Court to decline to grant certiorari on Petitioner's first question.

B. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO RESOLVE A PURPORTED SPLIT IN AUTHORITY ON WHETHER THE PROPONENT OR OPPONENT OF CLOSURE BEARS TO THE BURDEN TO SUGGEST ALTERNATIVES TO CLOSURE, AS THE QUESTION IS NOT ADJUSTED TO THIS CASE, AND PETITIONER DID NOT RAISE HIS "STRICT SCRUTINY" ARGUMENT BELOW.

Petitioner also asks the Court to grant certiorari to resolve a purported split of authority on whether the opponent or the proponent of closure has the duty to suggest alternatives to closure. (Petition, p. 18). Petitioner further urges the adoption of a "strict scrutiny" test for closure, which he asserts is essentially the test this Court has been applying and which he contends would automatically place the burden on "those

[7] Petition, pp. 16-17.

seeking to curtail the protected right to demonstrate that there are no other, reasonable ways to achieve [their] goals." (Petition, p. 24) (citations and internal quotation marks omitted). Respondent submits this issue presents no basis for the grant of certiorari, as it is not adjusted to this case since the trial court acted sua sponte in ordering closure and the court is not a "party" or a "movant" or someone "seeking to curtail" a right, and the "strict scrutiny" argument is raised for the first time in this petition.

The Georgia Supreme Court found that, despite language in Waller about a trial court's duty to consider alternatives to closure, no alternatives were suggested to the trial court by either Petitioner or the prosecutor. Presley, 285 Ga. at 273. The Supreme Court noted Petitioner only made a "nebulous request for 'accommodation'" for some family members and jurors. Id.

The Court then observed, as had the Second Circuit, that this Court had not clearly spoken to "whether a court must, sua sponte, advance its own alternatives to [closure]." Id. (citing Ayala v. Speckard, 131 F.3d 62 (2d Cir. 1997) (en banc), cert. denied, 524 U.S. 958 (1998)[8]). The Georgia Supreme Court adopted the reasoning of People v. Ramos, 685 N.E.2d 294 (N.Y. 1997), that, if there is no discussion on the record about

[8] The State cited Ayala in its appellee's brief.

alternatives to closure, it can be inferred that the trial court determined no lesser alternatives were available. Presley, 285 Ga. at 273. The Court further held that it is appropriate to conclude, where the factual record permits closure and the latter is not facially overbroad, the party opposing closure must suggest alternative procedures and that any other rule would place an almost impossible burden on a trial court, as a defendant on appeal could always likely suggest a better way. Id.[9]

In his petition, after quoting the Georgia Supreme Court's observation, based on Ayala, Petitioner cites an unpublished decision of an Ohio appellate court as expressing the "emerging view" that a trial court has no duty to consider alternatives to closure unless the opponent of closure suggests it. (Petition, p. 19, citing State v. Brown, No. 73060, 1998 Ohio App. LEXIS 5589 (Ohio Ct. App. Nov. 25, 1998)). Brown discusses Ayala. However, Petitioner cites no other decisions which address or concur that this is an "emerging view." He only quotes a California case which opined that the press is usually required

[9] In that regard, Petitioner points out that he suggested "reasonable alternatives" to closure in his first appellant's brief in the Georgia Supreme Court. (Petition, p. 18 n.14). This argument ignores the fact that these alternatives came almost far too late to be of assistance to the trial court at the 2005 trial and buttresses the observations of the Georgia and the New York appellate courts that a defendant on appeal could likely come up with yet another alternative.

to bear the burden to show there are reasonable alternatives to closure. (Petition, p. 19, citing NBC Subsidiary (KNBC-TV), Inc., v. Superior Court, 980 P.2d 337, 365 n.40 (1999)).

Petitioner then makes the blanket assertion that this "emerging view" is "hardly universal" and that numerous courts have required that closure be subjected to "truly strict scrutiny." (Petition, p. 19). In a footnote, he cites twelve decisions which he asserts require "strict scrutiny," id., but a review of those decisions belies his characterization as they do not appear to address strict scrutiny per se or apply that standard.

Instead, in ten of those twelve cases, the prosecutor or the defense requested closure of proceedings, or one party in a civil action asked that proceedings or sealed documents be opened, and the courts addressed whether the opponent had the duty to suggest alternatives to closure or the proponent had the duty to show there were no alternatives to closure.[10] One case

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[10] Guzman v. Scully, 80 F.3d 772 (2d Cir. 1996) (state prosecutor asked for partial closure during the examination of a prosecution witness); United States v. Peters, 754 F.2d 753 (7th Cir. 1985) (defendant asked for closure of voir dire); United States v. Powers, 622 F.3d 317 (8th Cir. 1980) (in a pre-Waller case, defendant asked for closure of the trial); Oregonian Pub. Co. v. U.S. Dist. Court, 920 F.2d 1462 (9th Cir. 1990) (in a mandamus action to unseal a guilty plea transcript, the party opposing disclosure of document had burden to demonstrate that alternatives were not workable); Judd v. Haley, 250 F.3d 108 (11th Cir. 2001) (prosecutor asked for closure of courtroom during testimony of the minor victim); Arkansas Television Co. v. Tedder, 662 S.W.2d 174 (Ark. 1983) (press asked for the pretrial suppression hearing to be public; decision did not specify who had requested closure or

involved a deputy sheriff's closing the courtroom during voir dire to spectators, unbeknownst to the presiding judge, the prosecutor or the defense, and the defense moved for a mistrial after this information came to light.[11] Only two cases cited by Petitioner involved closures sua sponte by trial judges, and one turned on state constitutional grounds[12] while the other involved a trial court's closing the courtroom to members of a defendant's family after an altercation in the courtroom, and the trial court declined to grant the alternatives suggested by the defense[13]. In neither case was the trial court analogized to a "party" or a "movant" or one "seeking to curtail the protected right." In short, there is no genuine "split" in authority applicable to this case that warrants the grant of certiorari.

Petitioner also attempts to distinguish Ayala on the basis that it involved a "partial" closure of criminal proceedings and that its discussion of a trial court's sua sponte consideration of alternatives should be relegated to a "partial" closure

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hearing, but the burden to show alternatives were not available was placed on proponent); Boston Herald, Inc., v. Sharpe, 737 N.E.2d 859, 868 n.24 (Mass. 2000) (press requested that sealed documents in family and probate courts of the criminal defendant and homicide victim be unsealed, and party seeking closure had burden to show there were no other alternatives); Carter v. State, 738 A.2d 871 (Md. 1999) (prosecutor requested closure of courtroom during testimony of 14-year old victim); Tinsley v. United States, 868 A.2d 867 (D.C. Cir. 2005) (prosecutor asked that defendant's family members be barred from courtroom during testimony of prosecution witness).

[11] Watters v. State, 612 A.2d 1288 (Md. 1992) (burden ultimately placed on the state to show closure was warranted).

[12] In re Orange, 100 P.3d 291 (Wash. 2004).

[13] Walker v. State, 723 A.2d 922 (Md. App. 1999).

scenario. (Petition, pp. 22-23 and n. 16). However, the Georgia Supreme Court did not reach the issue of whether the closure here was "partial" or "complete," though the parties had argued that issue in their briefs. The Court found that it was not "overbroad" and was limited for the duration of voir dire. Presley, 285 Ga. at 272.

Petitioner then argues this Court has virtually applied a "strict scrutiny" test to closure cases which was derived from other First Amendment cases, that this Court "intended" that courtroom closures be subject to strict scrutiny, and that such a test would automatically place the burden of suggesting alternatives upon "those seeking to exclude the public." (Petition, pp. 23-24). He then posits that this Court never intended for the burden of suggesting alternatives to fall on the opponent of closure. Id. at 25, 26.

The problem is that Petitioner did not make such an argument in the Georgia Supreme Court so that the Court could consider such an analysis. Though he had alleged that both his state and federal constitutional rights to a public trial were violated by the trial court's actions, he never argued that First Amendment strict scrutiny analysis would or should put the burden on the proponent of closure. He only argued before the Georgia Supreme Court that Georgia's constitutional protections clearly placed

the burden of suggesting alternatives upon the movant wanting closure and that Lumpkin was controlling. (Attachments D, E). That argument is why the Georgia Supreme Court noted:

> Presley asserts that the "movant" wishing closure has certain burdens that were not met in this case. See R.W. Page Corp., supra. As in Berry v. State, 282 Ga. 376, 378-380(3) (651 SE2d 1) (2007), neither party moved for closure - the State was silent during the relevant exchange - and we will not characterize the trial court's role as that of "movant" under Lumpkin.

Presley, 285 Ga. at 274 n.5. (emphasis in original).

Thus, Petitioner asks this Court to grant certiorari to consider a "strict scrutiny" analysis that he did not present to the Georgia Supreme Court. He has not shown there is a genuine split in the authority applicable to this case. Accordingly, Respondent urges the Court to decline to grant certiorari to consider Petitioner's second question.

CONCLUSION

Wherefore, for all the above reasons, Respondent prays that this Court decline to grant certiorari.

Respectfully submitted,

THURBERT E. BAKER
Attorney General

MARY BETH WESTMORELAND
Deputy Attorney General

Paula K. Smith

PAULA K. SMITH
Senior Assistant Attorney General

Please serve:

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(404) 656-3351

ANYONE WHO'S NOT A MEMBER OF THE JURY PANEL, UNLESS IT'S THE BAILIFF, YOU KNOW, IF YOU HAVE A QUESTION FOR ME. BUT YOU CAN'T TALK TO MR. PRESLEY, MR. SHAFER, MR. MASON. THE ATTORNEYS AREN'T EVEN GOING TO SAY GOOD MORNING, HOW ARE YOU TODAY. THAT WOULD BE A VIOLATION OF THE COURT'S INSTRUCTIONS. AND, AS I INDICATED, IF ANYONE TRIES TO COMMUNICATE WITH YOU IN ANY FASHION, YOU SHOULD REPORT THAT TO THE BAILIFF.

I BELIEVE YESTERDAY SOMEONE WHO IS NOT A MEMBER OF THE PANEL, SOMEONE WHO WAS INTERESTED IN THE OUTCOME OF THE CASE, HAPPENED TO KNOW ONE OF THE JURORS AND WENT UP AND HAD A CONVERSATION WITH THE JUROR AND HUGGED THAT JUROR. WELL, THAT WAS A VIOLATION OF THE COURT'S INSTRUCTION. PEOPLE DON'T COME TO THE COURTHOUSE AND HANG AROUND JUST BECAUSE THEY LIKE TO BE HERE. MOST OF YOU KNOW THAT. YOU WOULDN'T BE HERE UNLESS YOU HAD A JURY SUBPOENA. MOST PEOPLE DON'T COME TO THE COURTHOUSE UNLESS THEY HAVE A LEGAL MATTER PENDING, AND IF THEY'RE OUTSIDE ON THE SIXTH FLOOR, THEY PROBABLY HAVE A LEGAL MATTER PENDING, OR THEY'RE INTERESTED IN SOME CASE PENDING IN ONE OF THE JUDGE'S COURTROOMS. SO THAT'S WHY YOU NEED TO AVOID ALL CONTACT WITH ANYONE, OTHER THAN YOURSELVES, AND, EVEN AMONG YOURSELVES, YOU CAN'T TALK ABOUT THE CASE.

NOW, DOES ANYONE HAVE ANY QUESTIONS BEFORE WE HEAR THE OPENING REMARKS FROM THE ATTORNEYS?

5/3/07

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

THE STATE	)	
	)	
vs.	)	**04 CR 2574-8**
	)	
ERIC PRESLEY	)	

AMENDED MOTION FOR NEW TRIAL

Comes now Eric Presley, Defendant in the above styled case, and amends his January 11, 2006 motion for new trial to add the following grounds:

1. This Court erred by refusing to make an accommodation to allow Mr. Presley's family to observe Mr. Presley's entire trial. (T. 5). Art. I, Sec. I, Par. XI(a) of the Georgia Constitution; the Sixth and Fourteenth Amendments to the United States Constitution; R. W. Page Corp. v. Lumpkin, 249 Ga. 576 (292 S.E.2d 815) (1982); Rockdale Citizen Publ. Co. v. State, 266 Ga. 579 (468 S.E.2d 764) (1996).
2. Trial counsel provided ineffective assistance by failing to object to and move to strike the hearsay evidence that at "the Wendy's ... an operation was going to be taking place for a kilo." (T. 166).
3. This Court erred by instructing the jury not to open the package containing the alleged cocaine. (T. 311).
4. Trial counsel provided ineffective assistance by failing to reserve exceptions to the jury instructions. (T. 314).

5. Trial counsel provided ineffective assistance by failing to elicit and argue to the jury the chain of custody problems and the testing problems with the State's drug evidence. See (T. 223-24, 361, 358).

WHEREFORE, Eric Presley requests this Court to grant him a new trial.

Respectfully submitted this 3rd day of May, 2007.

Gerard Kleinrock
Attorney for Defendant
Georgia Bar # 425110

Office of the DeKalb County Public Defender
408 Callaway Building
120 West Trinity Place
Decatur, GA 30030
(404) 371-2222

CERTIFICATE OF SERVICE

This Is to Certify that Judge Oliver DA-8 has receive a Copy of this Document from Superior Court. This the 8 day of May 20 07.
SIGNED: Pat Head

FILED
2007 MAY -3 P 1:58
CLERK OF SUPERIOR COURT
DEKALB COUNTY GA

CERTIFICATE OF SERVICE

I certify that I have served the District Attorney of the Stone Mountain Judicial Circuit with a copy of the within and foregoing AMENDED MOTION FOR NEW TRIAL by leaving same with Mr. Daniel Quinn, Assistant District Attorney, Stone Mountain Judicial Circuit, 707 DeKalb County Courthouse, Decatur, Georgia 30030.

This 3rd day of May, 2007.

Gerard Kleinrock
Attorney for Defendant

FILED
2007 MAY -3 P 1:58
CLERK OF SUPERIOR COURT
DEKALB COUNTY GA

SUPREME COURT OF GEORGIA
Clerk's Office

Atlanta, **July 7, 2008**

TO ALL COUNSEL:

Case No. **S08C1152: ERIC PRESLEY v. THE STATE**

The Supreme Court today granted the writ of certiorari in this case. All the Justices concur, except Carley, J., who dissents.

****

This case will be assigned to the **October 2008**, oral argument calendar automatically under Supreme Court Rule 50 (2), as amended September 13, 1996. **Oral argument is mandatory in granted certiorari cases.**

This Court is particularly concerned with the following issue or issues:

> Did the Court of Appeals err in applying the abuse of discretion standard to the trial court's closure of a courtroom for voir dire.

Briefs should be submitted only on these points. See Supreme Court Rule 45.

Sincerely,

Jeanette Eidson

Jeanette Eidson, Deputy Clerk

Attachment C

c/m. 7/01

87-006

IN THE SUPREME COURT OF GEORGIA

ORIGINAL

ERIC PRESLEY,	)	
	)	
Petitioner/Appellant.	)	
	)	
V.	)	No. S08G1152
	)	
STATE OF GEORGIA,	)	
	)	
Respondent/Appellee.	)	

BRIEF OF PETITIONER/APPELLANT

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The Federal constitution strictly protects the right to a public trial by requiring that all stages of all hearings be open to the public and to the defendant's family. This "presumption of openness may be overcome only [where] closure is essential to preserve higher values and is narrowly tailored to serve that interest," and only where there is no available alternative to closure ..... -7-

The Georgia constitution provides even more protection for the right to a public trial than its federal counterpart. In Georgia, "open hearings are the nearly absolute rule and closed hearings the very rarest of exceptions." The burden rests squarely upon those seeking closure to demonstrate that there are no available alternatives to the closure. And closings can only be justified by "clear and convincing proof;" "[a]ssumptions and speculation" can never justify closure ..... -9-

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PART III.

ARGUMENT AND CITATION OF AUTHORITY

A. The Federal constitution strictly protects the right to a public trial by requiring that all stages of all hearings be open to the public and to the defendant's family. This "presumption of openness may be overcome only [where] closure is essential to preserve higher values and is narrowly tailored to serve that interest," and only where there is no available alternative to closure.

The right to a public trial is a jealously guarded constitutional right. It is protected by the First, Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Section I, Paragraphs V and XI(a) of the Georgia Constitution. It is not limited to the evidentiary portion of the trial; it specifically encompasses the voir dire and other portions of the trial. Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 511(III) (104 S.Ct. 819, 78 L.Ed.2d 629) (1984) ("Absent consideration of alternatives to closure, the trial court could not constitutionally close the voir dire"), R. W. Page Corp. v. Lumpkin, 249 Ga. 576, 578-79(3) (292 S.E.2d 815) (1982) ("We construe [the] state constitutional provision to be as applicable to pre-trial, mid-trial, and post-trial hearings as to the trial itself"). See also Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 13-14(IV)(B) (106 S.Ct. 2735, 92 L.Ed.2d 1) (1986) (even "preliminary hearings ... cannot be closed unless specific, on the record findings are made demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve

that interest") (internal quotation marks omitted).

This public trial right certainly extends to a defendant's family. Indeed, the right of the defendant's family to attend the trial is perhaps the most important component of this right. In re Oliver, 333 U.S. 257, 271-72 (68 S.Ct. 499, 92 L.Ed. 682) (1948) ("without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged"); Guzman v. Scully, 80 F.3d 772, 776 (2nd Cir. 1996) ("The exclusion of courtroom observers, especially a defendant's family members and friends, even from part of a criminal trial, is not a step to be taken lightly").

As with all rights, there are exceptions. The exceptions to a public trial right, however, are strictly limited.

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Press-Enterprise Co., 464 U.S. at 510(II)(B). See also id. ("it must be shown that the [closure] is necessitated by a compelling ... interest, and is narrowly tailored to serve that interest").

> Even with findings adequate to support closure, the trial court[] ... [must] consider whether alternatives

> [are] available to protect the interests ... that the trial court's orders [seek] to guard. Absent consideration of alternatives to closure, the trial court [can] not constitutionally close the voir dire.

Id. at 511(III).

B. The Georgia constitution provides even more protection for the right to a public trial than its federal counterpart. In Georgia, "open hearings are the nearly absolute rule and closed hearings the very rarest of exceptions." The burden rests squarely upon those seeking closure to demonstrate that there are no available alternatives to the closure. And closings can only be justified by "clear and convincing proof;" "[a]ssumptions and speculation" can never justify closure.

"Georgia law ... regarding the public aspect of hearings in criminal cases is more protective of the concept of open courtrooms than federal law." Lumpkin, 249 Ga. at 578(3). This Court has stressed

> the extreme importance of the strong presumption favoring the general rule, which is that in Georgia, the criminal trial itself, and all its consequent hearings on motions (pre-trial, mid-trial and post-trial) shall be open to the press and public on equal terms unless the ... movant is able to demonstrate on the record by "clear and convincing proof" that closing the hearing to the press and public is the only means by which a "clear and present danger" to [the] ... asserted right can be avoided. A Georgia trial court judge must approach these issues possessed of less discretion than his federal counterpart because our constitution commands that open hearings are the nearly absolute rule and closed hearings the very rarest of exceptions.

Id. at 579(4). Accord Red & Black Pub. Co., Inc. v. Board of Regents, 262 Ga.

848, 853 n.11(3)(a) (427 S.E.2d 257) (1993) ("We note our state's strong policy against secret criminal trials. Indeed, our constitution requires that criminal trials be public") (emphasis in original).

Any closure "order shall only be entered pursuant to written findings of fact fully articulating the alternatives to closure considered by the trial court and the reason or reasons why such alternative would not afford the movant an adequate remedy." Id. at 580(6); accord id. at 579-80(4) (noting that "[w]hile federal trial court judges are admonished to consider ... alternative[s] to the closing of hearings ..., we now hold that a Georgia trial court judge shall use [alternatives] ... unless for some reason fully articulated in his findings of fact and conclusions of law [the alternative] would not adequately protect" the asserted interest) (emphasis in original).

i) *Those seeking closure carry the burden to demonstrate "that no means available other than closure of the hearing will serve to protect" the asserted interest. Those opposing closure have no burden to provide or suggest alternatives to closure.*

This Court has placed the burden of addressing alternatives to closure squarely upon those seeking to exclude the public:[2]

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[2] Note that any contrary rule would be particularly unfair in the circumstances presented by this case, where the trial court closed the courtroom without giving any advance notice, in direct contravention of this Court's requirements. See Lumpkin, 249 Ga. at 580(5) ("A motion for closure shall receive no consideration by a trial court unless

> The motion must be supported ... by the movant by evidence constituting "clear and convincing proof" that no means available other than closure of the hearing will serve to protect the [asserted interest].

Lumpkin, 249 Ga. at 580(5) (emphasis added).[3] Accord id. at 579(4) ("in Georgia,

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it is in writing, has been served upon the opposing party, has been filed with the clerk of the court and posted on the case docket (as notice to the press and the public) for at least one twenty-four hour period in advance of the time when the motion will be heard") (footnote omitted). The entire discussion in this case, from the court's first announcement of its intention to exclude the public until its final ruling, covers just two full transcript pages. (T. 3-5). It would be fundamentally unfair to require the opponent of closure to list every reasonable alternative under such unreasonable time constraints. The trial court, like every movant, obviously took some time to give previous thought to the matter, e.g. (MNT T. 60-61) (trial court stated that it had routinely closed its courtroom as a matter of general "policy"). The movant, with this time luxury, should therefore be required to analyze the reasonably available alternative remedies before seeking this most extreme remedy.

[3] Although Georgia has heightened requirements for public trials, it appears that the United States Supreme Court has reached precisely the same conclusion. For example, that Court held that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Press-Enterprise Co., 464 U.S. at 510(II)(B) (emphasis added). It then held that

> the trial court's orders denying access to voir dire testimony failed to consider whether alternatives were available to protect the interests of the prospective jurors that the trial court's orders sought to guard. Absent consideration of alternatives to closure, the trial court could not constitutionally close the voir dire.

Id. at 511(III) (emphasis added). Accord Press-Enterprise Co., 478 U.S. at 14(IV)(B) ("the court failed to consider whether alternatives short of complete closure would have protected the interests of the accused"). See also United States v. Peters, 754 F.2d 753, 761(III) (7th Cir. 1985) (the trial court "did not consider other alternatives or explain their rejection on the record. Nor did [the movants], who carried the burden of persuasion as the proponents of closure, explain why other alternatives to closure were unavailable. Absent consideration of alternatives to closure, the trial court could not constitutionally close voir dire") (citation and internal quotation marks omitted); Tinsley v. United States, 868 A.2d 867, 879(III)(C) (D.C. Cir. 2005) ("we are not so sure that a trial judge should be absolved from considering even the most obvious reasonable alternatives to exclusion

the criminal trial ... shall be open to the press and public on equal terms unless the ... movant is able to demonstrate on the record by 'clear and convincing proof' that closing the hearing ... is the only means by which a 'clear and present danger' to his ... asserted right can be avoided").

Lumpkin, in fact, clearly demonstrated the proper application of these burdens. Lumpkin noted specifically that nobody had asked the trial court to consider any alternatives to closure: "more narrow and less harsh means of [protecting the asserted interest], such as jury sequestration, were not presented to or considered by the trial court as viable alternatives to [the closure]." Id. at 577 n.4. Nevertheless, despite this complete failure of anyone to suggest any alternatives, this Court still discussed several available alternatives to closure (primarily jury sequestration) that the trial court had failed to consider, and reversed the trial court's closure order. Id. at 579-80.

It is thus beyond dispute that the burden lies directly upon the movant to justify closure, and that to meet its burden, the movant must demonstrate that no

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of the public that may be available merely because the parties have failed to propose them. To take that position would be to slight the independent public interest in an open courtroom"); Guzman, 80 F.3d at 774 & 776 (finding that the "requirement of considering alternatives to closure was not even attempted to be met," and explicitly discussing one possible alternative that "might well have sufficed," despite the fact that defense counsel had simply opposed the closure, without elaboration or suggestion of any alternatives).

The opinions of the United States Supreme Court strongly indicate that a trial court must actively "consider whether alternatives [are] available," rather than passively consider only those alternatives that have actually been proffered.

alternative remedies are available.

ii) Those seeking closure must present "clear and convincing proof" that closure is the only available remedy. "Assumptions and speculation can never justify" closure.

We know that a Georgia court proceeding can only be closed upon "'clear and convincing proof' that closing the hearing to the press and public is the only means by which a 'clear and present danger' to [the] ... asserted right can be avoided." Lumpkin, 249 Ga. at 579(4). But what constitutes "clear and convincing proof"?

> Assumptions and speculation cannot provide the "clear and convincing proof" required by Lumpkin to justify closure. "Clear and convincing proof" necessarily involves concrete, tangible evidence that can be made part of and attached to the record to enable appellate review of a trial court's decision on an issue of constitutional magnitude. Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness. Assumptions and speculation can never justify the infringement on First Amendment rights which the closure of criminal proceedings creates.

Rockdale Citizen Publ. Co. v. State, 266 Ga. 579, 580 (468 S.E.2d 764) (1996) (citation and some internal quotation marks omitted). See also id. at 583 (Carley, J., concurring specially) ("if the perceived threat ... actually comes to pass .... the trial court would be authorized to consider such a motion and to grant it if 'clear and convincing proof' is produced showing that closure is the only means by

which 'a clear and present danger' to [the asserted interest] could be avoided").

C. The constitutional rights to a public trial apply with full force to the voir dire phase of the trial.

The trial court appears to have based its closure order upon its perception that voir dire was not a part of the trial for which the public had any right to attend. When Mr. Presley objected "to the exclusion of the public from the courtroom," and asked for "some accommodation ... for both, some of those members of the family and the jurors," the trial court replied:

> Well, the uncle can certainly come back in once the trial starts. There's no, really no need for the uncle to be present during the jury selection. When the trial starts, he can certainly come back into the courtroom.... But, when the trial starts, the opening statements and other matters, he can certainly come back into the courtroom.

(T. 4-5) (emphasis added). Accord (MNT T. 62) (trial court, in response to Mr. Presley's argument regarding the measures necessary to "protect[] the right to a public trial," asserts "he got a public trial"); (MNT T. 65) ("but the public was not excluded from the trial .... they saw the trial, but I exercised my discretion and did not permit them to intermingle with the jurors and sit on the benches with the jurors. And I used my discretion to decide how many jurors I wanted to comfortably seat in the courtroom").

57-006

IN THE SUPREME COURT
STATE OF GEORGIA

ORIGINAL

ERIC PRESLEY,

Petitioner/Appellant.

V.

STATE OF GEORGIA,

Respondent/Appellee.

No. S08G1152

REPLY BRIEF OF PETITIONER/APPELLANT

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SUPREME COURT OF GEORGIA

therefore, with a partial closure"). "Given the absence of any public access to the courtroom during this key portion of [the] trial, the closure cannot appropriately be rationalized as 'partial' under our precedent." Judd, 250 F.3d at 1317(III).

More importantly, not all courts provide lesser scrutiny to "partial" closures. E.g. Mahkuk, 736 N.W.2d at 685(II); People v. Willis, 274 Ill. App. 3d 551, 553-54(I) (Ill. App. Ct. 1995) ("The Press-Enterprise/Waller 'overriding interest' test applies to both full and partial closures of trial proceedings"). And this Court has already explicitly rejected the "partial" closure analysis: "Contrary to the state's argument, the requirements outlined in Lumpkin do apply to the situation in this case, where the court excludes the general public but permits the news media to remain." Stephens v. State, 261 Ga. 467, 470(7) (405 S.E.2d 483) (1991). See also Brief of Petitioner/Appellant, p. 21 n. 9 for additional discussion.

2. **This Court has already established that the burden rests squarely upon the movant, and upon nobody else, to establish that there are no alternatives to closing a courtroom. The contrary rule would subject this fundamental right to the whims of those who may have more interest in violating it than upholding it.**

This Court has already clearly and explicitly established that "Georgia law ... is more protective of the concept of open courtrooms than federal law." R. W. Page Corp. v. Lumpkin, 249 Ga. 576, 578(3) (292 S.E.2d 815) (1982). "A Georgia trial court judge must approach these issues possessed of less discretion than his

federal counterpart." Id. at 579(4). The State ignores these critical principles, and attempts to found a waiver argument almost entirely upon foreign caselaw.

The State contends, in reliance upon a federal case, that the trial court need not consider alternatives to closure unless they were explicitly raised by the defendant. Brief of Respondent/Appellee, p. 16. Notably, the single case relied upon by the State explicitly held that it did not need to decide this issue. Ayala v. Speckard, 131 F.3d 62, 71(III)(B) (2nd Cir. 1997). Other courts have held to the contrary. United States v. Peters, 754 F.2d 753, 761(III) (7th Cir. 1985) (the trial court "did not consider other alternatives or explain their rejection on the record. Nor did [the movants], who carried the burden of persuasion as the proponents of closure, explain why other alternatives to closure were unavailable. Absent consideration of alternatives to closure, the trial court could not constitutionally close voir dire") (citation and internal quotation marks omitted); Tinsley v. United States, 868 A.2d 867, 879(III)(C) (D.C. 2005) ("we are not so sure that a trial judge should be absolved from considering even the most obvious reasonable alternatives to exclusion of the public that may be available merely because the parties have failed to propose them. To take that position would be to slight the independent public interest in an open courtroom").

But it is axiomatic that none of these federal cases control this Court. Instead, this Court should follow Lumpkin, which held, like Peters, that the burden

is on "the movant [to present] evidence constituting 'clear and convincing proof' that no means available other than closure of the hearing will serve to protect" the asserted interest. 249 Ga. at 580(5). In other words, Lumpkin has already explicitly rejected the principle suggested (but not adopted) by Ayala. Lumpkin clarified this difference between Georgia and foreign practice:

> While federal trial court judges are admonished to consider jury sequestration (or some other remedy) as an alternative to the closing of hearings to the public and the press, we now hold that a Georgia trial court judge shall use jury sequestration (or some other means) ... unless for some reason fully articulated in his findings of fact and conclusions of law jury sequestration (or another remedy) would not adequately protect the [asserted interest].

Id. at 579-80(4) (emphasis in original).

This rule is the only rule that can truly protect the fundamental right to a public trial -- a right that inures to all Georgians. Indeed, it is not unheard of for the state and the defendant to both seek closure. See Rockdale Citizen Pub. Co. v. State, 266 Ga. 92, 92 (463 S.E.2d 864) (1995) ("The State agreed with Turner and likewise moved to close the pretrial hearings").[2] In such a circumstance (and absent a litigious reporter) who, exactly, will protect the open trial right? The Lumpkin rule squarely places the burden of protecting this right upon the only

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2 The State itself notes the likelihood that "defendants rarely object" to courtroom closures. Brief of Respondent/Appellee, pp. 19-20.

participant that can be trusted to protect it: the trial judge.[3] Day in, day out, in trials throughout our state, Lumpkin protects the right we all share. Lumpkin clearly instructs trial judges not to close their courtrooms -- unless the movant can prove that closure is actually necessary. Not: unless somebody happens to suggests a better idea. Unless closure is actually necessary.

This Court cannot retreat from the Lumpkin rule without substantially eroding the public's right to attend our trials. While our high profile trials may still be opened by litigious reporters, what of our much more common, routine trials? What of the routine trials, like this one, that are closed as a matter of policy? If we cannot rely on the parties, and reporters are not interested, who then will keep these trials open? Will members of the general public be bold enough to resist a judge's attempt to clear a courtroom?[4]

Nevertheless, reversal would be mandated in this case even absent the Lumpkin rule. A trial court obviously need not consider any alternatives to closure

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3 As this very case demonstrates, trial courts might not always have an inherent motivation to protect the public trial right. But a clear ruling by this Court, placing the responsibility for protecting the right directly and unambiguously upon the trial courts, should suffice to insure such a motivation. Such an opinion would inform our trial courts that they face certain reversal if they do not take full responsibility for properly safeguarding this fundamental right.

4 Note that here, it was Mr. Presley's lawyer, and not Mr. Presley's family, that resisted the closure order.

unless that closure is first justified.[5] There was obviously no justification for the blanket closure of the courtroom, because there was in fact ample room for Mr. Presley's family. Allowing the public to sit in the empty seats is constitutionally required; it is not a mere "alternative."

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5 This "alternatives" dispute is academic for other reasons. Mr. Presley did in fact attempt to raise the issue of "alternatives," but his request was summarily rejected by the trial court, which ruled that "there's no, really no need for the uncle to be present during jury selection." (T. 4). The trial court made it clear that it would not consider any alternatives -- because there was simply "no need" to do so. See McIntosh v. United States, 933 A.2d 370, 378 (D.C. 2007) ("We cannot be confident, however, that the court adequately considered alternatives .... The one alternative that was even mentioned ... appears to have been discounted because clearing the courtroom would not be 'an intrusion' on persons with no involvement in the case, i.e., the general public. As we have said, both the accused and the general public have an interest in open trials. On this record, however, there is little or no indication that the trial court considered such competing interests"); State v. Torres, 844 A.2d 155, 160 (R.I. 2004) ("nothing in the record indicates to us that the trial justice was aware of his obligation to keep the trial public").

Finally, the trial court's own discussion did address the most obvious and appropriate alternative: the grant of a mistrial in the unlikely event that a defendant's family ever does misbehave. Id. At least this alternative was therefore directly considered (and rejected) by the trial court. This is perhaps the most appropriate "alternative" of all, at least in a case where there is no specific reason to suspect that there will be any misbehavior.

CERTIFICATE OF SERVICE

I, Paula K. Smith, a member of the Bar of this Court, hereby certify that I have this day served within the time for filing a copy of this BRIEF, prior to filing same, by depositing a copy of the same in the United States Mail, first class postage prepaid and properly addressed, to:

Gerard Kleinrock, Esq.
DeKalb County Public Defender
Room 408 Callaway Building
120 West Trinity Place
Decatur, Georgia 30030

This 2d day of November, 2009.

Paula K. Smith

PAULA K. SMITH
Senior Assistant Attorney General

REPLY BRIEF

Supreme Court, U.S.
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ORIGINAL

No. 09-5270

UNITED STATES SUPREME COURT

ERIC PRESLEY,
Petitioner

v.

STATE OF GEORGIA,
Respondent

On Petition for Writ of Certiorari
to the Georgia Supreme Court

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF 1

The question of whether case-specific evidence is required to close a courtroom has not been sufficiently answered by this Court, as evidenced by the multiple rulings below that routine courtroom closures are appropriate. 1

All courtroom closures should be governed by the same tests. Closures should not receive lesser scrutiny just because they are imposed sua sponte by a judge. It is certainly appropriate, then, to consider all closure cases as to the split of authority below. 3

Mr. Presley's second question is properly before this Court. The Georgia Supreme Court explicitly considered, and ruled upon, the federal law issue that has split the lower courts. That federal law ruling is properly subject to federal review, even if Mr. Presley had not raised the federal issue in his brief to the Georgia Supreme Court. 4

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PETITIONER'S REPLY BRIEF

I. The question of whether case-specific evidence is required to close a courtroom has not been sufficiently answered by this Court, as evidenced by the multiple rulings below that routine courtroom closures are appropriate.

Mr. Presley's first question presented addresses what evidence is required to justify excluding the public from a criminal trial. Georgia's response to this question consists of an argument that this Court has already settled the issue.

But if the law is so clear, why has every court that has addressed this case found the closure in the instant case justified? It is apparent that the law is not sufficiently clear, at least for the Georgia courts. The trial court demonstrated that it closed voir dire as a matter of policy.[1] The Georgia Court of Appeals considered the closure nothing more than a routine exercise of a trial court's discretion. And the Georgia Supreme Court affirmed without requiring case-specific evidence,[2]

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[1] Georgia claims that Mr. Presley presented no evidence of any such policy. Respondent's Brief in Opposition, p.13. But Mr. Presley presented perhaps the most compelling evidence of all: the trial court's own admissions. See Petition for Certiorari, p.17 n. 13.

Note further that there was no case-specific evidence to justify the closure in this case. This closure, itself, demonstrates the routine nature of the trial court's closures.

[2] Georgia now speculates that Mr. Presley's uncle must have "done something to have called himself to the attention of the trial court." Respondent's Brief in Opposition, p.11. Mr. Presley notes that the only "something" the record shows that the uncle did was

thereby "giv[ing] the trial courts ... the green light to exclude the public entirely from voir dire" in "hundreds or perhaps even thousands of similar cases pending on the dockets of trial courts throughout this state." Petitioner's Appendix A7 (Sears, C.J., dissenting).

The right to a public trial is too fundamental a right to be so easily dismissed. And the danger, here, extends well beyond Georgia's borders. Courts throughout the country have been too eager to approve the closure of voir dire.[3] The opinion below will only further embolden them.

This Court should grant the writ to protect the critical right to a public trial, to clarify that case-specific evidence is required, and to prevent the spread of such cavalier closures, both within and beyond Georgia.

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attempt to sit in the courtroom during voir dire. None of the three state courts that have addressed this case have ever even speculated that he did anything more.

[3] Georgia cited several such cases to the Georgia Supreme Court, in pages 16-18 of its brief opposing certiorari to the Georgia Court of Appeals. It argued to the Georgia Supreme Court, for example, that "The few Sixth Amendment-closure cases related to voir dire may be due to the notion that 'it is not certain that the Public Trial Clause applies to voir dire proceedings.' Woodson v. Hutchenson, 52 Fed. Appx. 195, 198 (4th Cir. 2002)."

II. All courtroom closures should be governed by the same tests. Closures should not receive lesser scrutiny just because they are imposed sua sponte by a judge. It is certainly appropriate, then, to consider all closure cases as to the split of authority below.

The second question presented by this case addresses who must suggest alternatives to the proposed closure. Georgia begins by asserting that "there is no genuine 'split' in authority applicable to this case," because most of the dozen cases Mr. Presley cited on one side of the split involved a party, rather than a judge, moving for closure. Respondent's Brief in Opposition, p.17. Where a trial court sua sponte closes its courtroom, Georgia suggests, without explanation, that the analysis should be different.

Mr. Presley prays that this Court will find that the right to a public trial bears protection, regardless of who seeks to curtail that right. The Sixth Amendment grants defendants "the right to a speedy and public trial," without any exceptions determined by the identity of the proponent of closure. This Court has never suggested that a defendant's public trial rights are more easily trammeled by a judge than by some other actor. It has, instead, always indicated that the same tests should be applied, regardless of the identity of the proponent.

III. Mr. Presley's second question is properly before this Court. The Georgia Supreme Court explicitly considered, and ruled upon, the federal law issue that has split the lower courts. That federal law ruling is properly subject to federal review, even if Mr. Presley had not raised the federal issue in his brief to the Georgia Supreme Court.

Georgia then moves on to cloud the issue, with a meritless and irrelevant argument that Mr. Presley did not raise federal law in his argument to the Georgia Supreme Court regarding the second question presented. It is true that Mr. Presley began this discussion with state law, because state law purported to be "more protective of the concept of open courtrooms than federal law." R. W. Page Corp. v. Lumpkin, 249 Ga. 576, 578, 292 S.E.2d 815, 819 (1982). See Respondent's Attachment D, p. 9. But Mr. Presley did not limit his analysis to state law. He specifically argued that "[a]lthough Georgia has heightened requirements for public trials, it appears that the United States Supreme Court has reached precisely the same conclusion." Respondent's Attachment D, p. 11 n.3. After quoting from two of this Court's cases (and also from three other federal cases), Mr. Presley concluded with an explicit statement that "[t]he opinions of the United States Supreme Court strongly indicate that a trial court must actively 'consider whether alternatives [are] available,' rather than passively consider only those alternatives that have actually been proffered." Id. See also id. at 7-9 (quoting the strict tests established by this Court's First Amendment closure cases).[4]

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[4] On pages 16-17 of his brief to the Georgia Supreme Court, in a portion not attached to Georgia's response brief, Mr. Presley also quoted directly from Waller v.

But, at any rate, this argument is irrelevant. The issue for this Court is governed by the opinion of the Georgia Supreme Court; the briefs submitted to that court are largely irrelevant. This Court properly "ha[s] jurisdiction in the absence of a plain statement that the decision below rested on an adequate and independent state ground." Michigan v. Long, 463 U.S. 1032, 1044 (1983). It is irrelevant if the Georgia Supreme Court might arguably have applied a waiver analysis. All that matters is that it did not find waiver. Caldwell v. Mississippi, 472 U.S. 320, 327 (1985) ("The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case"); Harris v. Reed, 489 U.S. 255, 266 (1989) ("we conclude that the Illinois Appellate Court did not 'clearly and expressly' rely on waiver as a ground for rejecting any aspect of petitioner's ... claim"); County Court of Ulster County, N. Y. v. Allen, 442 U.S. 140, 154 (1979) ("if neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim").

Georgia, 467 U.S. 39, 46 (1984):

> the analysis in [the United States Supreme Court's prior open courtroom] cases has proceeded largely under the First Amendment. Nevertheless, there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public.

The Georgia Supreme Court clearly did rule based upon federal law.[5] It stated, with regard to this specific issue, that "the United States Supreme Court did not provide clear guidance regarding whether a court must, sua sponte, advance its own alternatives to" closure. Petitioner's Appendix A4. And it resolved the issue by reference to a federal case and a state case that itself explicitly considered federal law on the issue. Id. See People v. Ramos, 90 N.Y.2d 490, 500-05, 685 N.E.2d 492, 497-501, 662 N.Y.S.2d 739, 744-48 (1997).

The question for this Court, as it decides whether to grant the writ, turns on the contents of the opinion of the Georgia Supreme Court. See Supreme Court Rule 10(b) and (c). It does not turn on the contents of the briefs to that Court. The reason is obvious: it is the opinion itself that will be followed by courts throughout the country. It is the opinion itself that will have an impact on future trials. The briefs, at this point, carry no weight. This Court should grant the writ of certiorari to consider those critical federal questions that were addressed by the Georgia Supreme Court.

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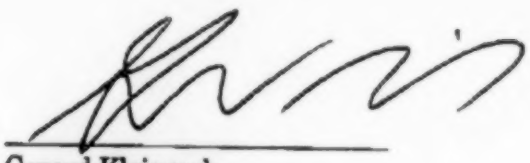
[5] Indeed, this case would still present a cognizable federal issue even had the Georgia Supreme Court not explicitly considered the federal law issues. A finding that the closure was appropriate, in the face of Mr. Presley's explicit federal constitutional challenge, could result from only two possible holdings: (1) a silent rejection of the federal challenge, or (2) a refusal to be governed by federal law. Either holding would obviously be subject to federal review.

Respectfully submitted, this 12th day of November, 2009.



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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

ERIC PRESLEY,
Petitioner,
v.
THE STATE OF GEORGIA,
Respondent.

On Petition for Writ of Certiorari to
The Supreme Court of Georgia

BRIEF *AMICUS CURIAE* OF THE GEORGIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Georgia Association of Criminal Defense Lawyers' purpose is "to promote constant improvement in the administration of criminal justice." www.gacdl.org.

Following *Presley v. State*, 285 Ga. 270, 674 S.E.2d 909 (2009), the right to a public voir dire has been threatened in Georgia courts. The loss of this fundamental constitutional right affects all members of the criminal justice system in the State of Georgia.

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[1] All counsel of record have received timely notice of the intent to file this brief as required by Supreme Court Rule 37.2, and this brief is submitted with the consent of all parties.

No counsel for any party to the case has authored any part of this brief, nor made any monetary contribution intended to fund its preparation or submission. No such monetary contributions have been made other than by the members of the Georgia Association of Criminal Defense Lawyers.

SUMMARY OF THE ARGUMENT

It is undisputed that the press and the public have a constitutional right of access to attend criminal trials. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982); *Press Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) ("*Press Enterprise I*"); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). *Globe Newspaper* established a "strict scrutiny test" to be employed when access rights are limited: the right of access can be outweighed only by a "compelling government interest" and denial must be "narrowly tailored to serve that interest." *Id.* at 606-07. The right of public access is implied in the First Amendment's "core purpose" of assuring free and open public discussion. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575, 100 S. Ct. 2814, 2826, 65 L.Ed.2d 973, 988 (1980). This right extends to voir dire:

> [S]ince the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown..., The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered. *Press-Enterprise*, 464 U.S. at 505, 510.

"[T]his Court has regularly relied on traditional and subsisting practice in determining constitutionally permissible authority of courts." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 728 n.2, 108 S.Ct. 2117, 2125, 100 L.Ed.2d 743 (1988) (Scalia, J.). In *Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 6 (1986) ("*Press Enterprise II*"), the Court relied upon the tests of a tradition of access to the preliminary proceeding and whether access plays "a significant positive role in the functioning of the particular process in question."478 U.S. at 8 (1986). "If the particular proceeding in question passes these test of experience and logic, a qualified First Amendment right of public access attaches." *Id.* at 9.

The right of public access to the courts is not a right that can be taken lightly. *State ex. rel. Storer Broadcasting Co. v. Gorenstein*, 131 Wis. 2d 342, 388 N.W.2d 633, 12 Media L R 1870 (Wis. App. 1986). "Although the public trial right may not be absolute, protection of this basic constitutional right clearly calls for a trial court to resist a closure motion except under the most unusual circumstances." *State v. Bone-Club*, 128 Wn.2d 254, 258-259, 906 P.3d 325, 327-328 (1995) (en banc). The guaranty of public access to proceedings and the right to a public trial served "complimentary and interdependent functions in assuring the fairness of our judicial system. In particular, the public trial right operates as an essential cog in the constitutional design of fair trial safeguards." *Id.*

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers

> keenly alive to a sense of their responsibility and to the importance of their functions..." *In re Oliver*, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L.Ed. 682 (1948).

Given the importance of the issue of closure to the public, to the defendant and to the criminal justice system as a whole, the Supreme Court ought to grant certiorari to finalize issues regarding proper procedure for closure, standards of review for closure, and burdens of arguing alternatives to closure to ensure that this right is upheld in Georgia courts.

ARGUMENT

I. THE PROCEDURES DEVELOPED FOR CLOSURE VARY WIDELY AMONG STATES AND RESULT IN DIFFERENT APPORTIONMENT OF THIS FUNDAMENTAL RIGHT DEPENDING ON WHERE THE TRIAL IS HELD.

The Court has always stressed the importance of the "interest of the judiciary and the public in correcting grossly prejudicial errors that undermine confidence in our legal system." *Greenlaw v. United States*, 128 S.Ct. 2559, 2574, 171 L.Ed.2d 399 (2008) (Alito J., dissent); *United States v. Olano*, 507 U.S. 725, 736-737, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Decisions in state and federal courts have chipped away at the right to public voir dire, contrary to this Court's explicit holdings regarding the rights to a public trial and jury selection. In New York, cursory approval of trial court's exclusion of family members during voir dire for crowding reasons has been given repeatedly: *People v. Gibbons*, 18 A.D.3d 773, 795 N.Y.S.2d 700 (App.Div.2d Dep't 2005); *People v. Mojica*, 279 A.D.2d 591, 719 N.Y.S.2d 608 (App. Div. 2d. Dep't 2001); *People v. Valentin*, 250 A.D.2d 497, 671 N.Y.S.2d 977 (App. Div. 1st. Dep't 1998). None of these New York decisions examine whether the court considered less restrictive alternatives to such a closure. In Florida, closure of a courtroom was justified because the trial court "simply excluded the idly curious" pursuant to a state statute that mandated closure of a courtroom to "all persons except parties to the cause and their immediate families" whenever a witness under the age of 16 testified concerning any sex offense. *Clements v. State*, 742 So.2d 338 (Fl. Ct.

App. 5th Dist. 1999).

Recent decisions hold that the Sixth Amendment right to a public trial does not apply to every moment of the trial. *United States v. Ivester*, 316 F.3d 955, 960 (II)(C) (9th Cir. 2003) (holding that "the values in *Waller* were not implicated by routine jury administrative matters that have no bearing on defendant's ultimate guilt or innocence."); *United States v. Edwards*, 303 F.3d 606, 616 (5th Cir. 2002) (determining whether *Waller* applies to a court's decision to empanel an anonymous jury); *Peterson v. Williams*, 85 F.3d 39, 42-43 (2d Cir. 1996) (unjustified closure for twenty minutes is too trivial to violate the Sixth Amendment); *United States v. Al-Smadi*, 15 F.3d 153, 154-55 (10th Cir. 1994) (the brief and inadvertent closure of the courtroom did not implicate the Sixth Amendment).

Several states offer substantive protection for the right to a public trial. In *Storer Broadcasting*, the trial court concluded that partial closure of voir dire was necessary to protect defendant's right to a fair trial, but it did so without holding a formal hearing, taking any evidence, or making any findings of fact. 131 Wis. 2d at 344 n.2, 388 N.W.2d at 635.

> The trial court based its closure order on the "fact" that [defendant] could not otherwise get a fair trial. While this may be a valid reason for ordering closure, it was insufficient here. The trial court merely speculated that [defendant] could not receive a fair trial if voir dire were not partially sequestered....The trial court's closure order was too severe a remedy here... [t]o close the courtroom to the general public to accomplish insulation of

> some of the prospective jurors was innappropriate and unnecessary. [I]t is *apparent that an easy alternative to closure was available to this trial court*: instead of moving prospective jurors in and out of chambers, the court could have simply moved the rest of the panel out of the courtroom and examined individual jurors in open court. In that manner, contamination could have been avoided without suppressing the public's right ... to know what the court was doing. 131 Wis. 2d at 350-51, 388 N.W.2d at 637. (Emphasis added).

Holding that the trial court gave no substantial, compelling reason to warrant closure of voir dire, the Appellate Court found that the trial judge had abused his discretion in ordering closure. *Id.* These "apparent" and "easy alternative[s] to closure" find counter-parts in *Presley*. The concerns in *Presley* were similarly "merely speculative" and could have been avoided by taking steps to cut down on the size of voir dire panel, and with curative instructions to the jury. Finally, the Court in *Storer Broadcasting* admonished the "trial court's attitude toward the closure issue," finding that "the trial court was mistaken in treating this matter lightly." 131 Wis. 2d at 351-52, 388 N.W.2d at 637-38. Here, too, the trial court in *Presley*, and trial judges throughout the country who also take lightly the right of public access to voir dire, ought to be admonished on a national scale.

In *State v.Bone-Club*, the defendant claimed that the temporary, full closure of his pretrial suppression hearing violated his right to a "speedy public trial." 128 Wn. at 258-59, 906 P.2d at 327-28. That court has

developed a strict, well-defined standard for closing a hearing in opposition to the public's right to open proceedings. To assure careful, case-by-case analysis of a closure motion, the trial court must perform a weighing test consisting of five criteria: (1) the proponent of closure or sealing must make some showing of a compelling interest, and where that need is based on a right other than the accused's right to a fair trial, the proponent must show a serious and imminent threat to that right; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. *Id.* ("*Bone-Club* factors").

In *State v. Wahle*, the trial court granted a defendant's motion to have the trial closed to the general public. 298 N.W.2d 795 (S.D. 1980), overr'ld on other grds by *State v. Abourezk*, 359 N.W.2d 137 (S.D. 1984). Following a hearing, the trial court determined that First Amendment rights could not be taken lightly and reopened the trial to the public. 298 N.W.2d at 798. The closing of a trial should be "an action of last resort taken by the trial court." *Id.* at 799. Alternatives, such as change of venue and sequestration of the jury are other alternatives to protect the defendant's right to a fair trial. *Id.*

In *Providence Journal Co. v. Superior Court*, the Supreme Court of Rhode Island held that a limited closure of individual voir dire may have been an

unconstitutional infringement on the press and public's right of access because the trial court's reasoning was unsupported by facts in the record that demonstrated that an open proceeding would in fact imperil or prejudice prospective jurors' privacy rights or defendant's right to a fair trial. 593 A.2d 446 (R.I. 1991). The trial court had reasoned that the limited closure of individual voir dire examination of prospective jurors to the press and public was necessary because of "the sensitive nature of the questions that would be asked of the jurors," in order to avoid subjecting "any juror or prospective juror... to embarrassment or concern that his or her responses to such sensitive questions chilled their answer." *Id.* at 446-447. In assimilating the teachings of prior cases into a viable and instructive standard for future trial courts, the court found that a four-part inquiry should be made before any closure limiting the press and public's right of access is justified; any closure "(1) must be narrowly tailored to serve the interests sought to be protected, (2) must be the only reasonable alternative, (3) must permit access to those parts of the record not deemed sensitive, and (4) must be accompanied by the trial justice's specific findings explaining the necessity of the order." *Providence*, 593 A.2d at 449, quoting *State v. Cianci*, 496 A.2d 139, 144 (R.I. 1985). By failing to comply with this four-part inquiry, the Rhode Island Supreme Court reasoned that the trial court's closure of the individual voir dire examination of prospective jurors may have been an unconstitutional infringement on the press and the public's right of access to criminal proceedings. *Providence*, 593 A.2d at 449.

> The trial court concluded that concern for the privacy rights of prospective jurors and the defendant's right to a fair trial merited limited closure. This conclusion, however, was unsupported by any facts in the record that demonstrated that an open proceeding would in fact imperil or prejudice those important interests. Consequently there was no compelling governmental interest that justified the limit imposed by the trial court on the press and public's right of access. In this respect the trial court's concerns were speculative and were an insufficient basis on which to conclude that limited closure was necessary. *Id.* (citing *Press-Enterprise I*, 464 U.S. at 510-511, 104 S. Ct. At 824-25, 78 L.Ed.2d at 639); *In re Dallas Morning News Co.*, 916 F.2d 205, 206 (5th Cir. 1990).

Under this reasoning, *Presley* must fail. Here, as in *Providence*, the court's conclusion that the "intermingling" of the defendant's family with prospective juror's may affect the fairness of the trial was "unsupported by any facts in the record that demonstrated" how the presence of defendant's family members in the courtroom during voir dire would actually impact the outcome of the trial. Consequently, here as in *Providence*, there was "no compelling governmental interest that justified" the dismissal of defendant's family from the courtroom during voir dire. The trial court's concerns were merely "speculative" and provided "an insufficient basis on which to conclude that a [c]losure was necessary."

The Fifth Circuit in *In re Dallas Morning News Co.* urged trial courts to employ less restrictive alternatives for protecting privacy of prospective jurors:

> the better practice is for the district court, rather than closing a portion of the voir dire proceeding in anticipation of privacy concerns, to inform the prospective jurors carefully, in advance, that any of them may request to be questioned privately, in the presence only of court personnel, the parties, the attorneys. We recognize that the very act of requesting in camera questioning could compromise the candor of a venire member's response to sensitive questions. Hence, the district court may close the proceedings for the limited purpose of explaining to the venire members, together or individually, the general nature of the questions to be asked and giving each the opportunity, during the closed proceedings, to request to be questioned in camera, but only as to those matters that are sufficiently sensitive to *justify the extraordinary measure of a closed proceeding*." 916 F.2d at 206-07 (Emphasis added).

Similarly, here, the trial court could have avoided the "extraordinary measure" of dismissing everyone from the courtroom by explaining, carefully, the consequences of any behavior that may effect the proceedings, whether in or out of the courtroom, between prospective jurors and the defendant's family members. Then, if there had been any evidence of improper fraternization, there may have been

sufficient facts on the record to justify the trial court's concerns about "intermingling."

However, "even assuming the findings necessary to demonstrate the compelling governmental interests to support the [c]losure were made, the trial court was required to consider any alternatives that might have been more narrowly tailored to protect" the interests of an open trial. *Press-Enterprise I.*, 464 U.S. at 511, 104 S. Ct. at 825, 78 L.Ed.2d at 639. For instance, in *Providence*, the record indicated that the trial court, both counsel, and the petitioners unsuccessfully attempted to reach a compromise that would have allowed a Providence News reporter to access the voir dire examination of prospective jurors. 593 A.2d at 450.

> Because we have already ruled that the trial court failed to make findings sufficient to justify limited closure, we need not decide whether the trial court's consideration of these alternatives was constitutionally sufficient. However, we commend the trial court's sensitivity to this issue in considering these alternatives and urge trial courts in the future to consider these and other alternatives to closure that will be less intrusive on the press and public's right of access yet still capable of protecting the legitimate interests of prospective jurors and the defendant. *Id.*

Here, the trial court also failed to make findings sufficient to justify closure during voir dire and gave no apparent consideration to less restrictive alternatives.

The Supreme Court of Virginia, in *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 281

S.E.2d 915 (1981), established certain guidelines for determining whether to grant a closure motion in a criminal trial:

> For intervention to take place, the public must have notice of the closure motion. For this reason, motions to close a hearing should be made in writing and filed with the court before the day of the hearing involved, and the public must be given reasonable notice that a closure hearing will be conducted. At the hearing on closure, the burden will be on the moving party to show that an open hearing would jeopardize the defendant's right to a fair trial. The intervenors, however, shall have the burden of showing that reasonable alternatives to closure are available. Upon entering a closure order, the trial judge shall articulate on the record his findings that the evidence supports the moving party's contention that an open hearing would jeopardize the defendant's fair trial rights, that alternatives will not protect these rights, and that closure will be effective in protecting them. There is the danger that the information sought to be kept from the public will be disclosed in the hearings on closure, thereby negating the purpose of closure. To protect against this, the trial court may hear or observe this information in camera in order to establish to what extent its release would be prejudicial to the defendant. *Richmond Newspapers, Inc.*, 222 Va. at 590, 281 S.E.2d at 924 (citations omitted).

The court in *In Re Times-World Corp.*, 7 Va. App. 317, 328, S.E.2d 474, 479 (1988), as here, apparently closed the proceedings without either party requesting such action. There, the trial judge had observed "I told them [the press] that we didn't have room for them and some of the things we talked back here that if they printed in the paper and the jury got hold of it, could very well – I'd have a mistrial." *Times-World*, 7 Va. App. at 321, 373 S.E.2d at 476. At the hearing regarding closure, the judge stated that "closed proceedings were necessary so the veniremen would give uninhibited answers to [counsel's] questions." 7 Va. App. at 322, 373 S.E.2d at 476.

In *Times-World*, the trial court "clearly was not concerned or possibly aware that 'absent an overriding interest articulated in findings,' such hearings should be open to the public. *Id.* at 327. "In fact, the court appeared to be under the mistaken belief that press access to the trial was dependent upon the defendant's request to have reporters present." *Id.* Furthermore, in *Times-World*, and here, "the court failed to give adequate notice of the closure [o]r provide an opportunity for the [public] to present alternatives to closure." *Id.* A closure hearing should have taken place before the closure order took effect. *Id.* It is at that point that the trial court should have taken the opportunity to articulate its reasons for closure if it found doing so was necessary. *Id.* Of the reasons the *Times-World* trial court gave for closing voir dire to the press, most were based on inconvenience to the court. *Id.* "We hold that none of the stated reasons rise to the level of an 'overriding interest' that outweighs the first amendment right of public access. In addition, even if closure was appropriate for part of the proceedings, the closure order was not 'narrowly tailored in this case to

suit the need." *Times-World*, 7 Va. App. at 327, 373 S.E.2d at 479. Concerns over space were also rejected:

> The trial court's concern over the lack of space in chambers did not necessarily mandate closing the entire hearing just because it could not accommodate every member of the local press. Moreover, the court never gave the press an opportunity to present alternatives to complete closure before the [h]earing. In addition, during that hearing... eight representatives of the media were accommodated in judge's chambers, along with the judge, five attorneys, and the court reporter, although the court described the chambers as "a little crowded." 7 Va. App. at 327-28.

The trial court in *Presley* shared markedly similar concerns over space, which are susceptible to the same reasoning used to reject them in *Times-World*. The *Presley* trial court's concern over the lack of space in the courtroom did not necessarily mandate closure of the entire voir dire process, since, as urged by Petitioner, the court could have taken less-restrictive alternatives, such as splitting the venire panel into two groups. The *Presley* trial judge feared that "intermingling" may occur between the defendant's family and the potential jurors. Here, again, the reasoning in *Times-World* is appropriate.

> However, the potential danger in this situation can be mitigated by instructing the jury, as is routine, to avoid receiving any outside information during any recess. In fact, the trial judge in the present case gave such an instruction at the close of evidence on

> the first day of trial... [and] this warning was essentially repeated to the jury at lunch breaks and at the close of trial on the second day. Unless the record shows to the contrary it is to be presumed that the jury followed an explicit cautionary instruction. The trial court, therefore, had taken adequate precautions to alleviate its concern that the jury might be influenced by the [public] during recesses. 7 Va. App. at 328-29.

The *Times-World* court also took issue with the trial judge's reasoning in closure of the entire voir dire process based on a belief that the veniremen might not be entirely candid in their responses, calling these concerns "unwarranted." *Id. Press-Enterprise I* offered an alternative to closure by giving instructions for jurors to request "an opportunity to present the problem [of potential embarrassment] to the judge *in camera* but with counsel present and on the record." 464 U.S. at 512. This Court may recommend that courts facing concerns over "intermingling" may either: split the venire panel to provide a buffer zone between the panel and the public, or give strict orders prohibiting outside discussion of the case amongst and between potential jurors and the public with instructions to point out any sort of evidence of tampering or intermingling to the extent the trial judge sought to avoid it.

The *Times-World* holding and its attendant reasoning is instructive:

> Clearly, the trial court, in this case, did not follow the basic tenet "that absent an 'overriding interest articulated in findings,' *Richmond Newspapers, Inc.*, 448 U.S. at 581,

> such hearings should be open to the public." A trial court, in deciding that closure might be warranted, or upon motion of either party, should give adequate notice of the closure hearing and provide and opportunity for [the public] to present alternatives to closure.... In addition, if the court decides that closure is necessary, it must articulate the basis for its finding of an *overriding interest* that requires closure, that closure is *essential* to preserving higher values than the presumption of openness, and the closure order must be *narrowly tailored* to serve that interest. We hold in the present case that the trial court erred in conducting closed proceedings without sufficient "overriding interest" articulated in the record, without first conducting a hearing on the matter, and without narrowly tailoring its closure order. Accordingly, the order of the trial court closing the proceedings to the [public] is reversed... 7 Va. App. at 330, 373 S.E.2d at 480-81. (Emphasis in original).

The same conclusion is applicable here, in *Presley*.

II. THERE IS A DEFINITE NEED FOR A FINAL ADJUDICATION REGARDING WHETHER THE DENIAL OF A PUBLIC TRIAL IS SUBJECT TO HARMLESS ERROR REVIEW.

A violation of one's right to a public trial is a structural error. *Waller*, 467 U.S. at 49; *Johnson v. United States*, 520 U.S. 461, 469, 137 L.Ed.2d 718, 117 S. Ct. 1544 (1997) (citing *Waller* as one of the "limited class" of cases where structural error had been found); *Carson v. Fischer*, 421 F.3d 83, 94 (2d Cir. 2005). Structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310, 113 L.Ed.2d 302, 111 S. Ct. 1246 (1991). Structural errors are not subject to harmless error analysis. *Id.* at 309. Structural error has consequences that are necessarily unquantifiable and indeterminate. *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993); *United States v. Gonzales-Huerta*, 403 F.3d 727, 734 (10th Cir. 2005) ([I]f, as a categorical matter, a court is capable of finding that the error caused prejudice upon reviewing the record, then that class of errors is not structural."); *United States v. Gonzales-Lopez*, 548 U.S. 140, 149 n.4, 126 S. Ct. 2557, 165 L.Ed.2d 409 (2006) ("violation of the public-trial guarantee is not subject to harmlessness review because the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance"). Therefore, once a petitioner demonstrates a violation of his Sixth Amendment right to a public trial, he need not show that the violation prejudiced him in any way. *Judd v. Haley*, 250 F.3d 1308, 1314-15 (II) (11th Cir. 2001); *Owens v. United States*, 483 F.3d 48, 64 (II)(C) (1st Cir. 2007) (closure of

a trial for an entire day of jury selection was a structural error that defied harmless error review). The mere demonstration that his right to a public trial was violated entitles the petitioner to relief. *Id.* If public trial error was not deemed structural and thus subject to harmless error analysis, it would almost always be held to be harmless and the public trial right would become a right in name only, since its denial would be without consequence. *Owens*, 483 F.3d at 63-64.

There is a split among states regarding whether a structural error can be subject to harmless error analysis. See *Commonwealth v. Baran*, 74 Mass. App. Ct. 256, 296-97, 905 N.E.2d 1122 (2009); Cf. *Slaughter v. State*, 1997 OK CR 78, 950 P.2d 839, 875 (VI)(A) (Okla. Crim. App. 1997), reh'g denied, (Feb. 3, 1998) and cert. denied, 525 U.S. 886 (U.S. 1998) and post-conviction relief denied, 1998 OK CR 63, 1998 WL 813108 (Okla. Crim. App. 1998) ("There is no blanket rule dealing with whether trial errors can be harmless... a structural error of constitutional dimensions affects the framework within which the trial proceeds, while trial error is an error in the trial process itself. As such, a trial error - constitutional or otherwise - is subject to harmless-error analysis.").

In *In re Pers. Restraint of Bonds*, the majority overturned the Appellate court's denial of defendant's request for equitable tolling where his counsel, once appointed, could not discover the issue of whether his right to a public trial was violated until after the statute of limitations had run. 165 Wn.2d 135, 196 P.3d 672 (2008)

> The[se] closures were also constitutional errors which violated [defendant's] right to a public trial and the public's right to access his trial. This error was manifest. Prejudice is presumed where a violation of the public trial right occurs. A violation of public trial right has been recognized as a "structural defect" under federal law. *Id.* at 135.

However, "when access to the courtroom is retained by some spectators (such as representatives of the press or the defendant's family members), we have found that the impact of the closure is not as great, and not as deserving of such a rigorous level of constitutional scrutiny." *Judd*, 250 F.3d at 1315 (distinguishing between partial and total closures). "Both partial and total closures burden the defendant's constitutional rights. *Id.* However, in the event of a partial closure, a court need merely find a substantial reason, and need not satisfy the elements of the more rigorous *Waller* test. *Id.*

Here, the *Presley* trial court instituted a total closure by ordering everyone out of the courtroom during voir dire. See *Judd*, 250 F.2d at 1315 ("Nowhere does our precedent suggest that the total closure of a courtroom for a temporary period can be considered a partial closure and analyzed as such."); *English v. Artuz*, 164 F.3d 105, 108 (2d Cir. 1997); *Bell v. Jarvis*, 236 F.3d 149, 165-66 (4th Cir. 2000). A total closure of the courtroom, even for a temporary period, eliminates for a time the valuable role the presence of spectators can have on the performance of witnesses (by discouraging perjury), and court officials (by ensuring that trial participants perform their duties conscientiously), and can create a public perception

that the defendant is not being treated justly. *Id.* at 1315-1316. Therefore, *Presley* ought to be examined under the most rigorous constitutional scrutiny.

Without guidance from this Court, states may continue to diverge in their protection of the right to a public trial on appeal.

III. *PRESLEY* SHIFTS THE BURDEN OF SUGGESTING LEAST RESTRICTIVE ALTERNATIVES TO CLOSURE TO THE OPPOSING PARTY. GUIDANCE FROM THIS COURT IS NECESSARY TO DETERMINE WHO MUST CARRY THIS BURDEN.

"Although *Waller* declared that trial courts are to consider alternatives to closure, the United States Supreme Court did not provide clear guidance regarding whether a court must, sua sponte, advance its own alternatives to it." *Presley*, 674 S.E.2d at 911. In the absence of clear guidance, the majority concluded that "where the factual record permits closure and the closure is not facially overbroad, the party opposed to closing the proceeding must alert the court to any alternative procedures that allegedly would equally procedures that allegedly would preserve the interest." *Id.* The majority reasoned that "any other rule would place an impractical – if not impossible burden on the trial courts." *Id.* at 912 (Internal citations omitted).

The failure to consider alternatives sua sponte is a clear violation of this Court's decision in *Waller v. Georgia*. *Id.* (Sears, C.J., dissenting). The majority failed to consider the burden that would be placed on

the opposing party if its rule were adopted, especially where, as here, the "counsel had no advance notice that the trial court intended to close voir dire" and "it is the trial court rather than a party who initiate[d] [closure]." *Id.* Since "[t]he guarantee [of a public trial] has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution... [and as] an effective restraint on possible abuse of judicial power," the burden should be on the trial court to expressly consider alternatives and to articulate reasons for rejecting those alternatives. *Id.* at n.12.

CONCLUSION

Presley v. State, and similar cases throughout the country, have abrogated the Sixth Amendment guarantee to a public voir dire. There is a need for guidance regarding procedures for closure, standards of review for closure, and where the burden lies for suggesting alternatives to closure. Therefore, this Court ought to grant certiorari to review the holding of the Georgia Supreme Court and to provide structure necessary to uphold this fundamental constitutional right.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

ERIC PRESLEY,
PETITIONER,

v.

STATE OF GEORGIA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE GEORGIA SUPREME COURT

BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Reporters often rely on access to court proceedings to report on matters of public concern. As "surrogates for the public," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980), journalists need unfettered access to information that sheds light on the function of the courts – especially information as vital to the integrity of the criminal justice system as the process of picking a criminal jury. This case concerns an issue critical to the media specifically and the public in general: whether a court may exclude the public from voir dire for the sake of administrative convenience, without considering any alternatives and without identifying a specific, overriding interest in secrecy that overcomes the presumption of public access to the courts.

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[1] Pursuant to Sup. Ct. R. 37, counsel for the *amicus curiae* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than the *amicus* made a monetary contribution to the preparation and submission of this brief; that counsel for all parties were given timely notice of the intent to file this brief; and that written consent of all parties to the filing of the brief *amicus curiae* has been filed with the Clerk.

SUMMARY OF ARGUMENT

Amicus curiae The Reporters Committee for Freedom of the Press ("*Amicus*") urges this Court to accept review in order to clarify two things: that a trial court may not exclude the public from criminal court proceedings simply because exclusion is deemed the most convenient way to address generalized concerns about jury taint; and that judges have an independent responsibility to safeguard the right of access to court proceedings by considering less restrictive alternatives to closure.

In this case, the trial court excluded the Petitioner's uncle from the whole of voir dire – indeed from the entire floor of the courthouse on which proceedings were being held – despite objections from defense counsel. Pet. App. F62-F63. It took this drastic action in what Chief Justice Sears, dissenting below, called "a garden variety drug trafficking case no different than hundreds or perhaps even thousands of similar cases pending on the dockets of trial courts throughout this state." *Id.* at A7. Indeed, the trial court regularly excluded the public from jury selection because it "believed – erroneously – that the constitutional commands to keep criminal trials open to the public do not apply to voir dire." *Id.* at A5. The Georgia Supreme Court approved this practice in an opinion so broad that it permits exclusion of the public from voir dire "whenever the trial judge decides, for whatever reason, that he or she would prefer to fill the courtroom with potential jurors rather than spectators." *Id.*

The Petitioner has ably argued that excluding the public over the objections of a criminal defendant is a violation of the Sixth Amendment right to a public trial. *Amicus* writes to emphasize a second point that the petition discusses in less detail – the trial court's actions also violated public's right of access under the First Amendment. Pet. 11 n.7.

In addition to "the Sixth Amendment right to a public trial [which is] personal to the accused," the First Amendment "secures the public an *independent* right of access to trial proceedings." *Richmond Newspapers*, 448 U.S. at 584-85 (Brennan, J., concurring in the judgment) (emphasis added). The "unbroken, uncontradicted history" of public proceedings, "supported by reasons as valid today as in centuries past," has given rise to a First Amendment presumption of public access to criminal court proceedings. *Id.* at 573. The First and Sixth Amendments each independently require a trial court considering closure to identify a specific "overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Waller v. Georgia*, 467 U.S. 39, 45 (1984) (quoting *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 510 (1984)). Because the First Amendment right belongs to the public rather than a party, it cannot be waived by either party's act or omission. *Press-Enterprise I*, 464 U.S. at 504 (presumption of access applied even when all parties sought closure).

The decision below ignores the unanimous judgments of *Press-Enterprise I* and *Waller*. *Amicus* urges the Court to accept review and reiterate that it meant what it said in both cases; criminal courtrooms may not be closed simply because it is easier to try cases in private, and judges have an independent responsibility to consider less restrictive alternatives to closure.[2]

ARGUMENT

I. The First Amendment protects public access to voir dire because it is vital to ensure "the basic fairness of the criminal trial."

Anglo-American court proceedings have been open to the public "from time immemorial." *Richmond Newspapers*, 448 U.S. at 566-67 (quoting E. Jenks, *The Book of English Law* 73-74 (6th ed. 1967)). Public access was inherent in the structure of early court proceedings, because the "moots" that later evolved into juries consisted of all the freemen in a particular community. *Press-Enterprise I*, 464 U.S. at 505 & n.1 (citing Pollock, *English Law Before the Norman Conquest*, 1 *Select Essays in Anglo-American Legal History* 88, 89 (1907); Radin, *The*

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[2] Certiorari is appropriate where "a state court ... has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Because the decision below conflicts with rules that the Court identified in *Press-Enterprise I* and *Waller*, the Court may prefer to dispose of the case summarily. *See, e.g., Duchesne City v. Summum*, 129 S. Ct. 1523 (2009) (summarily vacating and remanding for further consideration in light of previous decision); *University of Notre Dame v. Laskowski*, 551 U.S. 1160 (2007) (same).

Right to a Public Trial, 6 Temp. L. Q. 381, 388 (1932); 3 W. Blackstone, *Commentaries* *349). Voir dire, in particular, has been public "since the development of trial by jury ... with exceptions only for good cause shown." *Id.* at 505. One account from the sixteenth century noted that challenges to prospective jurors were conducted "openly, that not only the [jurors], but the Judges, the parties *and as many* [others] *as be present may heare* (sic)." *Id.* at 507 (quoting T. Smith, *De Republica Anglorum* 96 (Alston ed. 1906)) (emphasis added by Court).

Such openness "is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial." *Richmond Newspapers*, 448 U.S. at 569. Voir dire is conducted in public, despite the administrative burdens inherent in open court proceedings, because "[t]he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." *Press-Enterprise I*, 464 U.S. at 505. Secrecy in jury selection poses a clear risk to the integrity of the criminal justice system. Without the press and public to act as watchdogs on the jury system, "suspicions might arise in a particular trial (or in a series of trials) that jurors were selected from only a narrow social group, or from persons with certain political affiliations, or from persons associated with organized crime groups." *In re Globe Newspaper Co.*, 920 F.2d 88, 94 (1st Cir. 1990). And this Court has observed that as a "general rule," "judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." *Waller*, 467 U.S. at 46 n.4 (quoting *Estes v. Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring)).

Mindful both of centuries of history and the need for continued openness, this Court unanimously recognized a First Amendment presumption of access to voir dire in *Press-Enterprise I*, a case in which a state court closed most (but not all) of a six-week voir dire process in a high-profile murder prosecution. 464 U.S. at 503-04. The closure was sought by both the government and the defense, out of concern for juror privacy and the defendant's Sixth Amendment rights. *Id.* Despite the agreement of the parties and partial nature of the closure, the Supreme Court found the closure unconstitutional, noting that the "selection of jurors has presumptively been a public process" throughout Anglo-American history. *Id.* at 505. The Court reasoned that "[t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known." *Id.* at 508 (citing *Richmond Newspapers*, 448 U.S. at 569-571).

Press-Enterprise I noted that closures "must be rare and only for cause shown that outweighs the value of openness." *Id.* at 509. The presumption of openness "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest," which "is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* at 510; *accord Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 13-14 (1986); *El Vocero de Puerto Rico (Caribbean*

Intern. News Corp.) v. Puerto Rico, 508 U.S. 147, 151 (1993).

In *Waller v. Georgia*, the Court adopted the *Press-Enterprise I* test for use in defendants' Sixth Amendment claims, reasoning "that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." *Waller*, 467 U.S. 39 at 46. It recognized the importance of the idea "that the public may see [a defendant] is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Id.* (quotations omitted). *Waller* noted that "the right to an open trial may give way in certain cases to other rights or interests," but added that "[s]uch circumstances will be rare, however, and the balance of interests must be struck with special care." *Id.* at 45.

Excluding the public from a criminal proceeding without meeting the *Press-Enterprise* test, then, does violence to more than the defendant's Sixth Amendment rights. It also violates the public's First Amendment right to attend proceedings. And even where the Sixth Amendment right is explicitly waived – for example, when the defendant seeks closure – the trial court is responsible for ensuring that the "independent public interest in an open courtroom" is protected. *Tinsley v. U.S.*, 868 A.2d 867, 879 (D.C. 2005).

II. The Court should accept review to reiterate that generalized, speculative concerns are insufficient to overcome the presumption of access to court proceedings.

Under the First and the Sixth Amendments, "individualized determinations are *always* required before the right of access may be denied: 'Absent an overriding interest *articulated in findings*, the trial of a criminal case must be open to the public." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608 n.20 (1982) (emphasis in original) (quoting *Richmond Newspapers*, 448 U.S. at 581); *see also Waller*, 467 U.S. at 48 (ordering new hearing where "the trial court's findings were broad and general").

The only interest cited by the court below, avoiding contamination of the jury, "is largely absent when a defendant makes an informed decision to object to the closing of the proceeding." *Waller*, 467 U.S. at 47 n.6. But even when this concern applies in full force, "[t]he First Amendment right of access cannot be overcome by the conclusory assertion that [open proceedings] might deprive the defendant" of the right to a fair trial. *Press-Enterprise II*, 478 U.S. at 15. Closure instead requires a specific showing of a particularly acute risk of prejudice, supported by "specific, individualized findings articulated on the record before closure." *U.S. v. Antar*, 38 F.3d 1348, 1359 (3rd Cir. 1994) (citations omitted). For example, the Seventh Circuit found that a trial court "failed to establish a 'threat' to the interest in an impartial jury" because it "failed to question potential jurors as to their awareness of media coverage of the voir dire, or engage in any other inquiry to support its conclusion that the 'integrity of the process' was infected."

U.S. v. Peters, 754 F.2d 753, 761 (7th Cir. 1985). Similarly, the generic finding that jurors "might be less candid if questioned in public" is not enough, because "if this general theory of potential prejudice were accepted as sufficient justification for closure without the necessity for finding potential prejudice based upon the circumstances of the particular case, all testimony could be taken in secret." *U.S. v. Brooklier*, 685 F.2d 1162, 1169 (9th Cir. 1982). Thus, the Second Circuit allowed voir dire to be closed in a racially-charged criminal trial where "potential jurors were unlikely to admit openly to harboring racist views." *ABC, Inc. v. Stewart*, 360 F.3d 90, 101 (2nd Cir. 2004). But it rejected closure in a subsequent case, because without "similarly sensitive or contentious lines of questioning," a generic interest in avoiding jury taint was insufficient to support closure. *Id.*

Courts have been equally demanding where other interests are asserted. For example, *Press-Enterprise I* found that the presumption of openness in voir dire could be overcome where "interrogation touches on deeply personal matters that [a] person has legitimate reasons for keeping out of the public domain." *Press-Enterprise I*, 464 U.S. at 511. But vaguely-asserted "concern[s] for the privacy rights of prospective jurors and the defendant's right to a fair trial" are "speculative and [are] an insufficient basis on which to conclude that a limited closure [is] necessary." *Providence Journal Co. v. Superior Court*, 593 A.2d 446, 449 (R.I. 1991); *see also In re Dallas Morning News Co.*, 916 F.2d 205, 206 (5th Cir. 1990) (insufficient to find that "the individual questioning of potential jurors predictably will raise questions that may infringe upon the venire members' privacy and

that their responses may be more candid if provided in private"); *CNN, Inc. v. U.S.*, 824 F.2d 1046, 1048-49 (D.C. Cir. 1987) (reversing court that "believed that no objective standard was available to guide [its] determination as to whether a juror's request for private questioning about a particular matter was appropriate").

As Chief Justice Sears noted in her dissent below, the case at bar involves neither "testimony by an undercover officer" nor "matters of national security." Pet. App. A7.[3] The trial court offered *no* particularized findings to support the putative interest in closure. Rather, it closed voir dire as a general practice because of a vague, speculative concern that venirepersons might speak with members of the public while sitting in the courtroom. *Id.* at A2. And the Georgia Supreme Court's decision, allowing such closure without any individualized determinations, is so broad that it "permits the closure of voir dire in *every criminal case* conducted in this courtroom whenever the trial judge decides, for whatever reason, that he or she would prefer to fill the courtroom with potential jurors rather than spectators." *Id.* at A7 (emphasis in original). For this reason alone, the decision below should be overturned.

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[3] By contrast, the *Press-Enterprise I* Court refused to presume a risk of prejudice to the jury even in a trial where "the most serious and emotional of issues were presented – the rape and strangulation killing of a fifteen year old white schoolgirl on her way to school, by a black man twenty-six years of age, with a prior conviction of forcible rape on an adolescent caucasian girl." *Press-Enterprise I*, 464 U.S. at 521 n.1 (Marshall, J., concurring in the judgment).

III. The Court should accept review to vindicate the "independent public interest in an open courtroom."

In addition to relying on a speculative interest in closure, the trial court erred in failing to consider *any* alternatives. Defense counsel repeatedly objected to closure and asked the court to consider alternatives, only to be cut off. Still, the Georgia Supreme Court considered his objections too "nebulous" to preserve the issue. Pet. App. A4.[4]

Press-Enterprise I and Waller held that "the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Waller*, 467 U.S. at 48 (*citing Press-Enterprise I*, 464 U.S. 501). And "a trial court should be obliged to show that the order in question constitutes *the least restrictive means available* for protecting compelling state interests." *Press-Enterprise I*, 464 U.S. at 520 (Marshall, J. concurring) (emphasis in original). The *Waller* Court ordered Georgia to provide a new hearing in part because "[t]he court did not consider alternatives to immediate closure of the entire hearing" and "[t]he post hoc assertion by the Georgia Supreme Court

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[4] Defense counsel did everything within his power to avoid the exclusion of the public. The record shows he objected to the exclusion of the public from the courtroom, was cut off by the court as he attempted to discuss alternatives to closure, and noted an exception to the trial court's order. Pet. App. F62-F63. It is difficult to imagine how an attorney, reporter, or member of the public could be any more persistent in objecting to court closure without risking sanctions.

that the trial court balanced petitioners' right to a public hearing against the privacy rights of others cannot satisfy the deficiencies in the trial court's record." *Waller*, 467 U.S. at 48-49 n.8. Neither *Waller* nor *Press-Enterprise I* contains *any* indication that the opponents of closure suggested alternatives. *Ayala v. Speckard*, 131 F.3d 62, 76-77 (2nd Cir.1997) (*en banc*) (Parker, J., dissenting). Both place the responsibility for considering alternatives to closures squarely on the trial court.[5]

This requirement to independently consider alternatives applies to both the *Press-Enterprise I* First Amendment analysis and the *Waller* Sixth Amendment analysis. But it takes on added force in the First Amendment context because judges are the guardians of the "independent public interest in an open courtroom." *Tinsley*, 868 A.2d at 879. Thus, trial courts should not "be absolved from considering even the most obvious reasonable alternatives to exclusion of the public that may be available merely because the parties have failed to propose them." *Id.*

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[5] The trial court below acted on its own motion in excluding the public. Pet. App. A2. The Georgia Supreme Court found that a *court* ordering closure sua sponte should be subject to fewer restraints than a *party* moving for closure. *Id.* at A5 n.5. But, as Chief Justice Sears noted, "[t]he constitutional right to a public trial is designed primarily to police the conduct of the judges who preside over them by exposing their actions to public scrutiny. Thus, it would seem even more important to require specific consideration, on the record, of alternatives when a trial court closes a portion of a trial to the public without any prompting by the parties." *Id.* at A6-A7 (*citing In re Oliver*, 333 U.S. 257, 270 (1948)).

In the First Amendment context, "there is a risk that the only parties present – the prosecutor and the defendant – may agree that closure is proper, leaving the public's interest unrepresented unless the trial court assumes the responsibility of protecting that interest." *Ayala*, 131 F.3d at 74 (Walker, J., concurring).[6]

The court below identified a longstanding split of authority regarding whether a court must "sua sponte, advance its own alternatives to" closure. Pet. App. A4. Many courts have looked to the language of *Press-Enterprise I* and concluded that the First Amendment requires judges to independently consider alternatives to closure. *See, e.g., Peters*, 754 F.2d at 761-63 (closure violated First Amendment where neither trial court nor party seeking closure "explain[ed] why other alternatives to closure were unavailable"); *CNN*, 824 F.2d at 1049 ("the District Court failed to abide by the standards set forth in *Press-Enterprise* for closing voir dire proceedings in

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[6] The court below suggests that requiring sua sponte consideration of alternatives "would place an impractical – if not impossible – burden on trial courts" because "a defendant on appeal could likely always" identify an alternative that was not considered. Pet. App. A4 (citation omitted). But the issue here is not that the court failed to exhaust every conceivable alternative to closure. Rather, it failed completely to consider alternatives because it was not aware that it was required to do so. *Id.* at A5. At the very least, a trial court should sua sponte consider the most common alternatives to closure before settling on total exclusion of the public. *See CNN*, 824 F.2d at 1049 (reversing where court failed to consider an alternative "expressly contemplate[d]" in *Press-Enterprise I*).

criminal cases" in part because it "acted apparently without considering alternatives that might minimize the degree of closure"); *In re The Herald Co.*, 734 F.2d 93, 100 (2nd Cir. 1984) ("the trial judge must consider alternatives and reach a reasoned conclusion that closure is a preferable course to follow to safeguard the interests at issue"). Others have emphasized that under *Press-Enterprise I*, it "is the burden of the party seeking closure ... to present facts supporting closure and to demonstrate that available alternatives will not protect his rights." *Oregonian Pub. v. District Court*, 920 F.2d 1462, 1467 (9th Cir. 1990) (*citing Brooklier*, 685 F.2d at 1167, 1169); *see also Peters*, 754 F.2d at 761 (party seeking closure "carried the burden of persuasion"); *Associated Press v. District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (proponent of closure must show closure is "strictly and inescapably necessary"). Though they sometimes differ in how they allocate the burden between proponents of closure and the court – here, one and the same – these decisions make clear that the *opponents* of closure are not responsible for proposing alternatives.[7]

Other courts, relying on Justice Powell's concurrence in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), have found that opponents of closure must

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[7] The Petitioner likewise has cited Sixth Amendment cases from several circuits and state high courts placing the burden of exploring alternatives to closure on the proponent of closure, the court, or both. *See, e.g.*, Pet. at 19 n.15 (*citing, inter alia*, *Guzman v. Scully*, 80 F.3d 772, 774, 776 (2nd Cir. 1996); *U.S. v. Powers*, 622 F.2d 317, 325 (8th Cir. 1980); *Judd v. Haley*, 250 F.3d 1308, 1317 (11th Cir. 2001)).

suggest alternatives. *See NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337, 365 n.40 (Cal. 1999). The Second Circuit thus relied on the concurrence in finding that "once a trial judge has determined that limited closure is warranted as an alternative to complete closure, the judge [need not] sua sponte consider further alternatives to the alternative deemed appropriate." *Ayala*, 131 F.3d at 71, 75. But as the dissenting judges in that case pointed out, *Waller* "was also authored by Justice Powell, was decided several years after *Gannett* and is controlling." *Id.* at 77 n.8 (Parker, J., dissenting).[8]

This split among multiple federal appellate courts and state courts of last resort on an important federal question is reason alone to accept review. Sup. Ct. R. 10(a),(b). The Court should reiterate that no party can waive the public's independent First Amendment right of access to proceedings. The First Amendment, perhaps even more than the Sixth, imposes on a trial court the independent obligation to safeguard the public interest by considering less restrictive alternatives to closure. Nor can the public interest in openness apply only when a member of the press or public jumps up and offers alternatives

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[8] The court below relied on *Ayala*, concluding that the closure was a limited one because "exclusion of observers was only for the duration of jury voir dire." Pet. App. A3. But the closure authorized in that case was far more limited, including just "the testimony of one witness" who feared for his life because of his undercover work. *Ayala*, 131 F.3d at 64. *Ayala* explicitly declined to decide whether *Waller* requires judges to consider alternatives sua sponte when faced with more extensive closures, such as the one here. *See Id.* at 71.

to court closure. Such a requirement would eviscerate the guarantee of public access.

CONCLUSION

Before a trial court excludes the public from criminal court proceedings, both the First and the Sixth Amendments require it to cite a particularized concern mandating closure and consider whether alternatives would alleviate the concern. Failing to observe these procedural safeguards irreparably harms the rights of the defendant, the public, and the press.

The trial court below excluded the public from jury selection because of a mistaken belief that voir dire was not a public proceeding. But rather than correct this error, the Georgia Supreme Court compounded it. The decision below rewrote the *Press-Enterprise* test, replacing compelling interests with administrative convenience and shifting the evidentiary burden from the party seeking closure to the party opposing it. The Court should accept review and reiterate that judges may not exclude the public any time convenience dictates, and that they may not do so without considering alternatives more in line with the centuries-old practice of conducting criminal trials in public view.

Respectfully submitted,

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August 13, 2009

PER CURIAM

SUPREME COURT OF THE UNITED STATES

ERIC PRESLEY *v.* GEORGIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 09–5270. Decided January 19, 2010

PER CURIAM.

After a jury trial in the Superior Court of DeKalb County, Georgia, petitioner Eric Presley was convicted of a cocaine trafficking offense. The conviction was affirmed by the Supreme Court of Georgia. 285 Ga. 270, 674 S. E. 2d 909 (2009). Presley seeks certiorari, claiming his Sixth and Fourteenth Amendment right to a public trial was violated when the trial court excluded the public from the *voir dire* of prospective jurors. The Supreme Court of Georgia's affirmance contravened this Court's clear precedents. Certiorari and petitioner's motion for leave to proceed *in forma pauperis* are now granted, and the judgment is reversed.

Before selecting a jury in Presley's trial, the trial court noticed a lone courtroom observer. *Id.*, at 270–271, 674 S. E. 2d, at 910. The court explained that prospective jurors were about to enter and instructed the man that he was not allowed in the courtroom and had to leave that floor of the courthouse entirely. *Id.*, at 271, 674 S. E. 2d, at 910. The court then questioned the man and learned he was Presley's uncle. *Ibid.* The court reiterated its instruction:

> "'Well, you still can't sit out in the audience with the jurors. You know, most of the afternoon actually we're going to be picking a jury. And we may have a couple of pre-trial matters, so you're welcome to come in after we . . . complete selecting the jury this afternoon. But, otherwise, you would have to leave the

> sixth floor, because jurors will be all out in the hallway in a few moments. That applies to everybody who's got a case.'" *Ibid.*

Presley's counsel objected to "'the exclusion of the public from the courtroom,'" but the court explained, "'[t]here just isn't space for them to sit in the audience.'" *Ibid.* When Presley's counsel requested "'some accommodation,'" the court explained its ruling further:

> "'Well, the uncle can certainly come back in once the trial starts. There's no, really no need for the uncle to be present during jury selection. . . . [W]e have 42 jurors coming up. Each of those rows will be occupied by jurors. And his uncle cannot sit and intermingle with members of the jury panel. But, when the trial starts, the opening statements and other matters, he can certainly come back into the courtroom.'" *Ibid.*

After Presley was convicted, he moved for a new trial based on the exclusion of the public from the juror *voir dire*. At a hearing on the motion, Presley presented evidence showing that 14 prospective jurors could have fit in the jury box and the remaining 28 could have fit entirely on one side of the courtroom, leaving adequate room for the public. App. to Pet. for Cert. E–37, E–41. The trial court denied the motion, commenting that it preferred to seat jurors throughout the entirety of the courtroom, and "it's up to the individual judge to decide . . . what's comfortable." *Id.*, E–38. The court continued: "It's totally up to my discretion whether or not I want family members in the courtroom to intermingle with the jurors and sit directly behind the jurors where they might overhear some inadvertent comment or conversation." *Id.*, at E–42 to E–43. On appeal, the Court of Appeals of Georgia agreed, finding "[t]here was no abuse of discretion here, when the trial court explained the need to exclude spectators at the voir dire stage of the proceedings and when members of

the public were invited to return afterward." 290 Ga. App. 99, 100–101, 658 S. E. 2d 773, 775 (2008).

The Supreme Court of Georgia granted certiorari and affirmed, with two justices dissenting. After finding "the trial court certainly had an overriding interest in ensuring that potential jurors heard no inherently prejudicial remarks from observers during voir dire," the Supreme Court of Georgia rejected Presley's argument that the trial court was required to consider alternatives to closing the courtroom. 285 Ga., at 272, 273, 674 S. E. 2d, at 911. It noted that "the United States Supreme Court [has] not provide[d] clear guidance regarding whether a court must, sua sponte, advance its own alternatives to [closure]," and the court ruled that "Presley was obliged to present the court with any alternatives that he wished the court to consider." *Id.*, at 273, 674 S. E. 2d, at 911, 912. When no alternatives are offered, it concluded, "there is no abuse of discretion in the court's failure to sua sponte advance its own alternatives." *Id.*, at 274, 674 S. E. 2d, at 912.

This Court's rulings with respect to the public trial right rest upon two different provisions of the Bill of Rights, both applicable to the States via the Due Process Clause of the Fourteenth Amendment. The Sixth Amendment directs, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." The Court in *In re Oliver*, 333 U. S. 257, 273 (1948), made it clear that this right extends to the States. The Sixth Amendment right, as the quoted language makes explicit, is the right of the accused.

The Court has further held that the public trial right extends beyond the accused and can be invoked under the First Amendment. *Press-Enterprise Co.* v. *Superior Court of Cal., Riverside Cty.*, 464 U. S. 501 (1984) *(Press-Enterprise I)*. This requirement, too, is binding on the States. *Ibid.*

The case now before the Court is brought under the

Sixth Amendment, for it is the accused who invoked his right to a public trial. An initial question is whether the right to a public trial in criminal cases extends to the jury selection phase of trial, and in particular the *voir dire* of prospective jurors. In the First Amendment context that question was answered in *Press-Enterprise I*. *Id.*, at 510. The Court there held that the *voir dire* of prospective jurors must be open to the public under the First Amendment. Later in the same Term as *Press-Enterprise I*, the Court considered a Sixth Amendment case concerning whether the public trial right extends to a pretrial hearing on a motion to suppress certain evidence. *Waller* v. *Georgia*, 467 U. S. 39 (1984). The *Waller* Court relied heavily upon *Press-Enterprise I* in finding that the Sixth Amendment right to a public trial extends beyond the actual proof at trial. It ruled that the pretrial suppression hearing must be open to the public because "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." 467 U. S., at 46.

While *Press-Enterprise I* was heavily relied upon in *Waller*, the jury selection issue in the former case was resolved under the First, not the Sixth, Amendment. *Press-Enterprise I*, *supra*, at 516 (STEVENS, J., concurring) ("The constitutional protection for the right of access that the Court upholds today is found in the First Amendment, rather than the public trial provision of the Sixth" (footnote omitted)). In the instant case, the question then arises whether it is so well settled that the Sixth Amendment right extends to jury *voir dire* that this Court may proceed by summary disposition.

The point is well settled under *Press-Enterprise I* and *Waller*. The extent to which the First and Sixth Amendment public trial rights are coextensive is an open question, and it is not necessary here to speculate whether or

in what circumstances the reach or protections of one might be greater than the other. Still, there is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has. "Our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant." *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 380 (1979). There could be no explanation for barring the accused from raising a constitutional right that is unmistakably for his or her benefit. That rationale suffices to resolve the instant matter. The Supreme Court of Georgia was correct in assuming that the Sixth Amendment right to a public trial extends to the *voir dire* of prospective jurors.

While the accused does have a right to insist that the *voir dire* of the jurors be public, there are exceptions to this general rule. "[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller*, 467 U. S., at 45. "Such circumstances will be rare, however, and the balance of interests must be struck with special care." *Ibid.* *Waller* provided standards for courts to apply before excluding the public from any stage of a criminal trial:

> "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.*, at 48.

In upholding exclusion of the public at juror *voir dire* in the instant case, the Supreme Court of Georgia concluded,

despite our explicit statements to the contrary, that trial courts need not consider alternatives to closure absent an opposing party's proffer of some alternatives. While the Supreme Court of Georgia concluded this was an open question under this Court's precedents, the statement in *Waller* that "the trial court must consider reasonable alternatives to closing the proceeding" settles the point. *Ibid.* If that statement leaves any room for doubt, the Court was more explicit in *Press-Enterprise I:*

> "Even with findings adequate to support closure, the trial court's orders denying access to *voir dire* testimony failed to consider whether alternatives were available to protect the interests of the prospective jurors that the trial court's orders sought to guard. Absent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire.*" 464 U. S., at 511.

The conclusion that trial courts are required to consider alternatives to closure even when they are not offered by the parties is clear not only from this Court's precedents but also from the premise that "[t]he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." *Id.*, at 505. The public has a right to be present whether or not any party has asserted the right. In *Press-Enterprise I*, for instance, neither the defendant nor the prosecution requested an open courtroom during juror *voir dire* proceedings; in fact, both specifically argued in favor of keeping the transcript of the proceedings confidential. *Id.*, at 503–504. The Court, nonetheless, found it was error to close the courtroom. *Id.*, at 513.

Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials. Nothing in the record shows that the trial court could not have accommodated the public at Presley's trial.

Without knowing the precise circumstances, some possibilities include reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members.

Petitioner also argues that, apart from failing to consider alternatives to closure, the trial court erred because it did not even identify any overriding interest likely to be prejudiced absent the closure of *voir dire*. There is some merit to this complaint. The generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident, is inherent whenever members of the public are present during the selection of jurors. If broad concerns of this sort were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course. As noted in the dissent below, "the majority's reasoning permits the closure of voir dire in *every criminal case* conducted in this courtroom whenever the trial judge decides, for whatever reason, that he or she would prefer to fill the courtroom with potential jurors rather than spectators." 285 Ga., at 276, 674 S. E. 2d, at 913 (opinion of Sears, C. J.).

There are no doubt circumstances where a judge could conclude that threats of improper communications with jurors or safety concerns are concrete enough to warrant closing *voir dire*. But in those cases, the particular interest, and threat to that interest, must "be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise I, supra,* at 510; see also *Press-Enterprise Co.* v. *Superior Court of Cal., County of Riverside*, 478 U. S. 1, 15 (1986) ("The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [the right to a fair trial]").

Per Curiam

We need not rule on this second claim of error, because even assuming, *arguendo*, that the trial court had an overriding interest in closing *voir dire*, it was still incumbent upon it to consider all reasonable alternatives to closure. It did not, and that is all this Court needs to decide.

The Supreme Court of Georgia's judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

ERIC PRESLEY *v.* GEORGIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 09–5270. Decided January 19, 2010

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

Today the Court summarily disposes of two important questions it left unanswered 25 years ago in *Waller* v. *Georgia*, 467 U. S. 39 (1984), and *Press-Enterprise Co.* v. *Superior Court of Cal., Riverside Cty.*, 464 U. S. 501 (1984) *(Press-Enterprise I)*. I respectfully dissent from the Court's summary disposition of these important questions.

First, the Court addresses "whether it is so well settled that [a defendant's] Sixth Amendment right" to a public trial "extends to jury *voir dire* that this Court may proceed by summary disposition." *Ante*, at 4. The Court's affirmative answer to this question relies exclusively on *Waller* and *Press-Enterprise I;* but those cases cannot bear the weight of this answer.

The Court correctly notes that *Waller* answers whether a "defendant's Sixth Amendment right to a public trial applies to a suppression hearing" (not to jury *voir dire*), 467 U. S., at 43, and that *Press-Enterprise I* interprets the *public's* First Amendment right to attend jury *voir dire*, 464 U. S., at 509, n. 8, so neither *Waller* nor *Press-Enterprise I* expressly answers the question here, see *ante*, at 4. That acknowledgment should have eliminated any basis for disposing of this case summarily; the Court should reserve that procedural option for cases that our precedents govern squarely and directly. See, *e.g.*, *United States* v. *Haley*, 358 U. S. 644 (1959) *(per curiam)* (summarily reversing a federal court's judgment that refused to follow, or even mention, one of our precedents upholding

the statute in issue under identical circumstances).

The Court nevertheless concludes that *Waller* and *Press-Enterprise I*—in combination—"well settl[e]" the "point." *Ante*, at 4. It admits that "[t]he extent to which the First and Sixth Amendment public trial rights are coextensive is an open question," but, apparently extrapolating from *Press-Enterprise I*, asserts that "there is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has." *Ante*, at 4–5. But this conclusion decides by implication an unstated premise: that jury *voir dire* is part of the "public trial" that the Sixth Amendment guarantees. As JUSTICE STEVENS recognized in *Press-Enterprise I*, that case did not decide this issue. See 464 U. S., at 516 (concurring opinion) ("If the defendant had advanced a claim that his Sixth Amendment right to a public trial was violated by the closure of the *voir dire*, it would be important to determine whether the selection of the jury was a part of the 'trial' within the meaning of that Amendment"). Until today, that question remained open; the majority certainly cites no other case from this Court answering it. Yet the Court does so here—even though the Supreme Court of Georgia did not meaningfully consider that question, and petitioner does not ask us to do so.* I am unwill-

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*In full, petitioner's two questions presented state:

"I. This Court has established that the public cannot be expelled from a courtroom unless the presence of the public creates a 'substantial probability' of prejudice to an 'overriding interest.' But is some case-specific evidence required to meet this 'substantial probability' test, or can generalized fears that would apply equally to nearly every trial suffice?

"II. This Court has repeatedly held that a trial court must consider reasonable alternatives to closing a proceeding before it can exclude the public. But who bears the burden of suggesting such alternatives? Must the proponent of closure establish that closure is necessary, in that there are no reasonable alternatives available? Or to overcome a

ing to decide this important question summarily without the benefit of full briefing and argument.

Second, I am also unwilling to join the Court in reading the "'alternatives to closure'" language it quotes from *Waller* and *Press Enterprise I* as squarely foreclosing the decision of the Supreme Court of Georgia. See *ante*, at 6. The Court chides the Supreme Court of Georgia for "conclud[ing], despite *our explicit statements* to the contrary, that trial courts need not consider alternatives to closure *absent an opposing party's proffer of some alternatives.*" *Ante*, at 5–6 (emphasis added). But neither *Waller* nor *Press-Enterprise I* expressly holds that jury *voir dire* is covered by the Sixth Amendment's "[P]ublic [T]rial" Clause. Accordingly, it is not obvious that the "alternatives to closure" language in those opinions governs this case.

Even assuming the Court correctly extends *Waller* and *Press-Enterprise I* to this (Sixth Amendment *voir dire*) context, neither opinion "explicit[ly]" places on trial courts the burden of *sua sponte* suggesting alternatives to closure "absent an opposing party's proffer of some alternatives." *Ante*, at 6. The statement that a "'trial court must consider reasonable alternatives to closing the proceeding,'" *ibid.* (quoting *Waller*, *supra*, at 48), does not definitively establish who must *suggest* alternatives to closure that the trial court must then *consider*, nor does it expressly address whether the trial court must suggest such alternatives in the absence of a proffer. I concede that the language can easily be read to imply the latter, and the Court may well be right that a trial court violates the Sixth Amendment if it closes the courtroom without *sua sponte* considering reasonable alternatives to closure. But I would not decide the issue summarily, and certainly would

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closure motion must an opponent of closure establish that reasonable alternatives do exist?" Pet. for Cert. i.

not declare, as the Court does, that *Waller* and *Press-Enterprise I* "settl[e] the point" without "leav[ing] any room for doubt." *Ante*, at 6.

Besides departing from the standards that should govern summary dispositions, today's decision belittles the efforts of our judicial colleagues who have struggled with these issues in attempting to interpret and apply the same opinions upon which the Court so confidently relies today. See, *e.g.*, *Ayala* v. *Speckard*, 131 F. 3d 62, 70–72 (CA2 1997) (en banc), cert. denied, 524 U. S. 958 (1998); 131 F. 3d, at 74–75 (Walker, J., concurring); *id.*, at 77–80 (Parker, J., dissenting). The Court's decision will also surely surprise petitioner, who did not seek summary reversal based on the allegedly incorrect application of this Court's well-established precedents by the Supreme Court of Georgia, but instead asked us to "resolve this split of authority" over whether "the opponent of closure must suggest alternatives to closure" or whether "those seeking to exclude the public must show that there is no available less-intrusive alternative." Pet. for Cert. 18.